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## ***THE ATTRITION OF RIGHTS UNDER PAROLE***

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## ARTICLES

# THE ATTRITION OF RIGHTS UNDER PAROLE

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### ABSTRACT

*We conduct a detailed doctrinal and empirical study of the adverse effects of parole on the constitutional rights of both individual parolees and the communities in which they live. We show that parolees' Fourth, Fifth and Sixth Amendment rights have been eroded by a multitude of punitive conditions endorsed by the courts. Punitive parole conditions actually increase parolees' vulnerability to criminal elements, and thus likely worsen recidivism. Simultaneously, the parole system broadly undermines the rights of nonparolees, including family members, cotenants, and*

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*communities. We show that police target parolee-dense neighborhoods for additional Terry stops, even when income, race, population, and single-family status are accounted for. Furthermore, police take advantage of the permissive parole search jurisprudence, conducting more searches and arrests of both parolees and their nonparolee neighbors. Combined, this analysis shows that parole institutionalizes individuals and marginalizes communities.*

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## INTRODUCTION

Prisoner parole<sup>1</sup> is widely considered to be a defendant-friendly institution<sup>2</sup> for obvious reasons—it is designed to reduce the sentences that individuals serve in prison and to aid prisoner reintegration.<sup>3</sup> However, a detailed analysis of how parole actually operates raises serious doubts about whether it really works in the interests of the incarcerated. In this Article, we show that there are a number of institutional mechanisms by which parole significantly undermines the Fourth, Fifth, and Sixth

1. Unless otherwise noted, this Article uses the terms “parole” and “community supervision” to refer to post-release community supervision after incarceration. *See, e.g.*, Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 482 (1999) (noting that jurisdictions use different terms to refer to this period of supervision).

2. *See Position Statement*, AM. PROBATION & PAROLE ASS’N (Jan. 1987), [http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB\\_PositionStatement](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB_PositionStatement) (describing the parole system as one designed to assist parolees); AMY L. SOLOMON ET AL., URBAN INST., DOES PAROLE WORK? (2005), available at [http://www.urban.org/UploadedPDF/311156\\_Does\\_Parole\\_Work.pdf](http://www.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf) (providing a more nuanced view of parole).

3. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (noting that parole was meant “to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed” and that it “also serve[d] to alleviate the costs to society of keeping an individual in prison”). *See also* Joel M. Caplan, *Parole System Anomie: Conflicting Models of Casework and Surveillance*, FED. PROBATION, Dec. 2006, at 32, 32–33 (2006) (describing the history of and policies supporting parole).

Amendment rights of parolees, as well as the Fourth Amendment rights of their communities. We conduct a detailed doctrinal and empirical analysis showing that the extensive conditions imposed on parolees, combined with other permissive search and seizure jurisprudence and police targeting of parolee-dense neighborhoods for nonrandomized stops, have resulted in significant yet unappreciated attrition of constitutional rights.

For parolees, the standard for reincarceration on suspicion of a parole violation is very low. Like other arrests, the federal standard for arrest for a parole violation is probable cause,<sup>4</sup> but unlike other arrestees, parolees can be held for up to three months awaiting a violation hearing. In addition, the standard at that hearing is not proof beyond reasonable doubt, but rather a preponderance of the evidence.<sup>5</sup> These low bars for extended incarceration of parolees awaiting a hearing create numerous points of vulnerability in constitutional rights.

First, the possibility of being incarcerated for three months for minor or technical violations of parole provides a powerful means of leverage over parolees. Police use this leverage to recruit parolees as confidential informants, a role that places parolees in danger but nonetheless serves an important community policing function. However, it also makes the parolee subject to less altruistic forms of influence. Local criminals and gangs who know the parole status of individuals can use the threat of reporting a violation of the terms of release—real or trumped up—as a basis for coercion. As such, although parole is meant to keep parolees on the path toward reintegration into the community, it actually provides a means of blackmailing parolees into criminality and recidivism.

Second, whatever the basis for arrest for an alleged parole violation, the rehabilitation and reintegration goals that the parole system was intended to promote are undermined by the length of incarceration that parolees face while awaiting their violation hearings. Even if exonerated, three months of incarceration is likely to cause parolees to lose their jobs, their welfare benefits, their access to schooling and housing, and even potentially their stabilizing relationships—the very elements that are the

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4. A supervised parolee “may be arrested” “[i]f there is probable cause to believe” he or she “has violated a condition of his . . . release.” 18 U.S.C. § 3606 (2012).

5. *Id.* § 3583(e)(3) (providing that a court may modify or revoke supervised release if it “finds by a preponderance of the evidence that the defendant violated a condition of supervised release”). *See also* *United States v. Maloney*, 513 F.3d 350, 354 (3d Cir. 2008) (quoting § 3583(e)(3) for the conclusion that a district court must find a violation of supervised release by a “preponderance of the evidence”) (internal quotation marks omitted).

best predictors of successful reintegration.<sup>6</sup> Recidivism is often considered a consequence of the individual's propensity to commit more crimes. But by creating a perverse system whereby minor infractions of parole lead to potentially disproportionate punishments, the regulatory system and jurisprudence of parole ultimately extend individuals' institutionalization and undermine their rehabilitation.

Third, the Sixth Amendment rules pertaining to parole are extremely restrictive of parolees' rights. As mentioned, conviction for a release violation requires only a preponderance of the evidence. So if a parolee is accused of a crime while on parole, he or she can be acquitted of that crime yet nonetheless be reincarcerated for that very offense under the lower standard of a parole violation. Furthermore, even if the parolee is only accused of a technical violation—for instance, failing to attend meetings with a parole supervisor—he or she can be subject to a longer term of incarceration than he was initially sentenced to serve. Not only that, but the parole violation can extend his or her sentence beyond the maximum sentence allowed for the initial crime.<sup>7</sup> These Sixth Amendment issues have been considered by the courts, and although we show logical inconsistencies in that jurisprudence, the point is not to reargue their merits; rather, when considered in combination with the other ramifications of parole described here, it becomes apparent that the overall effect of parole on prisoners can be to elongate rather than shorten sentences and also to further contribute to the institutionalized cycle of imprisonment.

An institutionalized culture of incarceration has been well documented as extending beyond the individual to particular subgroups of the community, particularly racial minorities.<sup>8</sup> What has not been appreciated, however, is the role that parole plays in that process of institutionalizing the culture of incarceration. This effect is not simply indirect, trickling down from the individual to the community by virtue of the sheer number of individuals incarcerated in particular regions or cultures; rather, the rights of individuals who live with or near parolees are directly undermined by the parole system and its jurisprudence.

Most significantly, if you live with a parolee or if the police suspect that you live with a parolee, your constitutional rights can be directly and

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6. See *infra* notes 234–35.

7. See *infra* Part II.B.

8. See generally Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (analyzing the destructive impact of incarceration at the community level rather than the individual level).

adversely affected by rulings that parolees can be subjected to manifold stringent restrictions.<sup>9</sup> In *Samson v. California*, the Supreme Court permitted parole conditions so strict that they “diminish or eliminate” any reasonable expectation of privacy.<sup>10</sup> Thus, *Samson* allows police to conduct searches of parolees and their homes without a warrant or even reasonable suspicion.<sup>11</sup> Not only are individual parolees subject to arbitrary searches and essentially forced to waive their own Fourth Amendment rights,<sup>12</sup> but to a large extent parole also has similar effects for those with whom they live.<sup>13</sup> The ramifications of this situation are far more profound for particular communities—consider that “[o]ne in three young African American men will serve time in prison if the current trends continue, and in some cities more than half of all young adult black men are currently under correctional control—in prison or jail, on probation or parole.”<sup>14</sup> Conceivably, then, there are entire neighborhoods in which Fourth Amendment rights have little meaning. The community effect, then, is not simply an aggregate of the effect on individuals, but rather it further exacerbates the impact of parole on rights attrition.

Parole jurisprudence raises the risk of serious attrition of community rights. To determine whether this possibility is in fact a reality, we conduct an empirical assessment of the extent to which different communities are facing diminution of their Fourth Amendment rights. We created two new databases that combine New York City parolee residence data with *Terry* stop<sup>15</sup> data as well as frisk, search, and arrest data. We establish two

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9. *Moore v. Vega*, 371 F.3d 110, 117 (2d Cir. 2004); *Thornton v. Lund*, 538 F. Supp. 2d 1053, 1057 (E.D. Wis. 2008) (citing *Motley v. Parks*, 432 F.3d 1072, 1078 (9th Cir. 2005)) (“[I]f officials reasonably believe that a parolee or probationer lives at a particular house, courts analyze the search as if the parolee or probationer in fact lived there.”).

10. *Samson v. California*, 547 U.S. 843, 847 (2006).

11. *Id.* See also *Thornton*, 538 F. Supp. 2d at 1057 (citing *United States v. Knights*, 534 U.S. 112, 121 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 875–76 (1987)) (“The Fourth Amendment provides lesser protection to parolees and probationers; such individuals may not complain of a warrantless search of their residence.”).

12. *United States v. Barnett*, 415 F.3d 690, 691–92 (7th Cir. 2005) (holding that the defendant’s decision to make a blanket waiver of his Fourth Amendment rights was valid, since “imprisonment is a greater invasion of personal privacy than being exposed to searches of one’s home on demand”).

13. See *infra* Part II.A.2.

14. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 9 (2010). Alexander’s data is based on THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001* (2003), available at <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

15. *Terry v. Ohio*, 392 U.S. 1 (1968), created an exception to the ordinary rule that individuals cannot be seized without probable cause and a warrant. Under *Terry* stops, police need only reasonable articulable suspicion to temporarily seize a person; furthermore, police can frisk—pat down the outside of the clothes of—an individual if they have reasonable suspicion that the subject possesses a weapon.

important effects showing that police target parolee-dense communities for nonrandomized stops and further intrusions.

First, we demonstrate that there is a strong relationship between rates of parolee residence and police *Terry* stops in New York City. Obviously this does not prove causation: we expect there to be more *Terry* stops in high-crime neighborhoods, and also more parolee residents in high-crime neighborhoods. However, our regression analysis shows that this finding is robust even after controlling for factors such as race, income, and density of single-parent families. These ordinary predictors of crime do not fully explain police targeting of individuals for *Terry* stops: the density of parolees in a neighborhood is significant beyond mere crime targeting by police.

The effect in fact overwhelms the race of the neighborhood—when parolee status is factored in, race no longer predicts the occurrence of *Terry* stops in New York City. This has great significance for the highly salient litigation that the New York City Police Department (“NYPD”) recently settled, with an agreement for ongoing judicial oversight.<sup>16</sup> The high correlation also shows the potential impact of the jurisprudential rules described above: entire neighborhoods with little to no constitutional criminal rights. Our results suggest that parole is likely to exacerbate the already troubled relationship that exists between the police and targeted minorities.

Second, we show that not only do police stop more individuals in high parolee density neighborhoods, but that they then conduct significantly more searches and arrests in those neighborhoods. The rate of frisks, however, are lower in parolee-dense neighborhoods, suggesting that police are not simply targeting high-crime or high-convict neighborhoods: only searches of parolees require lower suspicion thresholds, enabling police to skip frisks and go straight to searches without probable cause. The numbers

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Any evidence gathered can then be used to establish probable cause for a search or arrest.

16. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), is a federal class action lawsuit filed against the New York City Police Department (“NYPD”) and the City of New York that found that the NYPD practice of nonrandom stop and frisks constituted unconstitutional racial discrimination. On November 11, 2013, a three-judge panel of the U.S. Court of Appeals granted the city’s motion to stay the district court’s remedial decision. *Ligon v. City of New York*, 736 F. 3d 118 (2d Cir. 2013). However, on November 24, 2013, the Court of Appeals issued an order holding this, and all other pending motions, in abeyance. *Id. Floyd* is one of three simultaneous lawsuits challenging the constitutionality of the NYPD stop and frisk program. The others are *Ligon v. City of New York*, 925 F.Supp. 2d 478 (S.D.N.Y. 2013) (challenging stops, ticket issuance and arrests of individuals in private apartment buildings) and *Raza v. City of New York*, No. 13-CV-3448, 2013 U.S. Dist. LEXIS 166820 (E.D.N.Y. Nov. 22, 2013) (alleging religious profiling in NYPD stops of Muslim New Yorkers).



are so significant that it is unlikely that only parolees are being targeted. Entire communities where parolees commonly reside are subject to different policing strategies. These results indicate that police have been utilizing the permissive search jurisprudence we critique to nonrandomly target some neighborhoods for greater intrusions. *Samson* and its ilk are having meaningful adverse effects on the broader communities in which parolees reside.

The first step to solving these problems is to recognize their existence and to question whether parole is really a positive mechanism of reintegrating convicts back into the community. Finding a solution also requires re-examining the jurisprudence surrounding parole, given these largely unintended consequences, and in light of our empirical findings of nonrandomized policing practices extending beyond race—parole is another geographic mechanism for the infectious degradation of community rights.

Throughout this Article, we analyze both the federal parole system, called supervised release, and the parole system in New York State as illustrations. New York rules on *Terry* stops are actually less intrusive than the Supreme Court allows.<sup>17</sup> Nevertheless, we show that in application, New York parolees and their communities are still vulnerable targets for police profiling. This is because even when jurisdictions only utilize some of the permissive *Terry* stop rules, in combination with other lowered rights created by the parole jurisprudence, parolees effectively have no real protection against police targeting. In effect, some lowered rights breed further lowered rights, for both the individual and the community. We first show this in terms of broad doctrinal theory, then in application.

Part I provides a brief background of parole, including the rules of operation and rates of revocation. It then describes the terms in which we assess the merits of the current parole system as crime enforcement and convict reintegration policy.

Part II provides an in-depth doctrinal analysis, exploring the adverse impact on parolees' constitutional rights. It first shows how *Samson* combines with *Georgia v. Randolph*<sup>18</sup> to diminish the constitutional rights of both parolees and the nonparolee communities in which parolees live. Not only is the individual institutionalized by the parole system, but also the constitutional rights of communities are systematically diminished. It

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17. See *infra* note 254 (showing that the rules in New York are somewhat more generous but otherwise similar to numerous other states).

18. *Georgia v. Randolph*, 547 U.S. 103 (2006).

then establishes how parole can actually extend rather than shorten parolees' sentences, even beyond the legislative maximums, and analyzes the Sixth Amendment implications of this policy. This part then describes the attrition of other procedural rights by the parole system, including (1) the state's lowered burden in parole revocation hearings, (2) evidentiary issues, and (3) other Fourth and Fifth Amendment ramifications.

Part III considers the practical effects of the parole system. It illustrates that the jurisprudence that permits extremely stringent parole conditions results in the vulnerability of individual parolees, decreasing their rights as against the police and increasing their manipulability by criminal elements. It then describes in detail the lowered burden on the police for stops and searches of parolees in New York City.

Part IV tests whether police target parolees in *Terry* stops, frisks, searches and arrests in New York City, and whether that affects not only parolees but also the community more broadly. We show that individual and community rights are being adversely affected in systematic ways by a parole jurisprudence of restrictive conditions and aggressive police searches, resulting in increased police stops, searches and arrests.

Part IV tests only one aspect of the attrition of individual and community rights enabled by an overly punitive parole system. Parts I-III provide the doctrinal framework to show why police will have incentives to target parolees in *Terry* stops and explore the broader impact of the parole system on the attrition of individual and community rights. Together, the legal and empirical analyses show that the overall parole framework undermines the reintegrative aims of the parole system.

## I. BACKGROUND: PAROLE AND SUPERVISED RELEASE

In this part, we briefly provide the most important background information on the parole system, including: an introduction to the central rules and operation of the parole system in federal and state jurisdictions; conditions of parole and bases of revocation; and rates of revocation and recidivism. We then describe how we assess the parole system, and how we can conclude that parole is diminishing constitutional rights overall.

### A. PAROLE IN GENERAL

In the federal system, community supervision—referred to as supervised release—is imposed by the court at sentencing and is mandatory when the individual is sentenced to a period of incarceration of one year or

more.<sup>19</sup> In addition, a court may also use its discretion to order supervised release whenever it imprisons an offender.<sup>20</sup> In these discretionary cases, the U.S. Sentencing Guidelines give courts detailed guidance about whether to impose a term of supervised release and what conditions to include. The court must consider certain statutory factors, including “the nature and circumstances of the offense and the history and characteristics of the defendant,” the need to deter crime, and the need to provide restitution.<sup>21</sup> It should focus particular attention on the seriousness of the offender’s criminal history.<sup>22</sup> A court should consider the same factors in determining whether to impose supervised release and the length of that release.<sup>23</sup> Section 3583(b) of Title 18 of the United States Code describes the maximum periods of supervised release for different levels of offense.<sup>24</sup>

Importantly, the term of supervised release is in addition to a term of imprisonment and “does not replace” any “portion of” this term.<sup>25</sup> This fact belies the common first response to criticism of the parole system from the perspective of the individual convict: that although parole conditions may be extremely stringent, presumably parole is preferable to remaining in prison, since parole amounts to at least partial freedom for a length of time that would otherwise be spent in incarceration. We return to this topic in Part II.B.

Throughout this Article, to illustrate the operation of parole in the

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19. 18 U.S.C. § 3583(a) (2012) (providing that a court “may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment”); U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(a)(2) (2013) (requiring supervised release when “a sentence of imprisonment of more than one year is imposed”). A term of community supervision is also mandatory if the statute governing the crime requires it or if the offender is convicted of domestic violence. 18 U.S.C. § 3583(a). And if the offender “is an abuser” of drugs or alcohol, “it is highly recommended” that the court include a term of supervised release. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 cmt. n.3(C).

20. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(b).

21. 18 U.S.C. § 3583(c). These are a “subset” of the factors a court must consider in determining how to punish someone convicted of a crime. *See also id.* § 3553(a) (“Factors to Be Considered in Imposing a Sentence”); *United States v. Johnson*, 640 F.3d 195, 203 (6th Cir. 2011) (discussing the use of these factors).

22. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 cmt. n.3(B).

23. *Id.* § 5D1.2 cmt. n.4 (“The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.”).

24. 18 U.S.C. § 3583(b) (providing, for example, maximum periods of release of five years for Class A or B felonies and three years for Class C or D felonies). The Sentencing Guidelines require minimal terms of release for these levels of offense. U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(a).

25. U.S. SENTENCING GUIDELINES MANUAL § 7A2(b) (“Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court.”).

states, we examine New York code and practices. New York law, like federal law, provides for the release of offenders to parole.<sup>26</sup> The length of parole supervision depends upon the class of the felony and the offender's criminal history,<sup>27</sup> and is negotiable as long as it falls within the guideline range.<sup>28</sup> Depending on the crime of conviction, even community supervision for the remainder of an offender's life is acceptable.<sup>29</sup> Since the period of supervision is considered part of the sentence, defendants must be informed of it as part of the sentencing judgment,<sup>30</sup> and knowledge of supervision is required for a guilty plea to be considered knowing, voluntary, and intelligent.<sup>31</sup>

#### B. CONDITIONS OF COMMUNITY SUPERVISION

The conditions of community supervision are fairly standard across jurisdictions. They typically include reporting requirements, curfews, prohibitions on the use of drugs or alcohol, and restrictions on travel, residency, and associating with certain individuals or groups. In the federal system, courts must impose as a condition of release that the offender shall not commit another crime or possess illegal drugs, and the U.S. Sentencing Guidelines recommend more than a dozen "standard" conditions.<sup>32</sup> For example, "the defendant shall not leave the judicial district . . . without the permission of the court or probation officer" and "the defendant shall support the defendant's dependents."<sup>33</sup> Another standard requirement that we will explore the ramifications of in Part II.A specifies that "the defendant shall permit a probation officer to visit the defendant *at any time* at home or elsewhere."<sup>34</sup> This provision offers just one of the ways in

26. N.Y. PENAL LAW § 70.40 (McKinney 2009). Post-release supervision is mandatory for a number of felony offenses, including violent felonies, drug offenses, and sex offenses. *Id.* § 70.45.

27. *Id.* § 70.45; Spiros A. Tsimbinos & John M. Castellano, *Practice Insights: Negotiating Period of Post-Release Supervision as Part of Determinate Term*, in N.Y. PENAL LAW § 70.45 (Consol. Supp. Feb. 2014).

28. Tsimbinos & Castellano, *supra* note 27 ("Counsel may negotiate the period of supervision within the permissible ranges as part of any plea and sentence discussion.").

29. *People v. Zammett*, 849 N.Y.S.2d 686, 687 (App. Div. 2008) (holding that imposing community supervision for the remainder of an offender's life for a criminal possession of a controlled substance in the third degree conviction was not too severe).

30. *People v. Catu*, 825 N.E.2d 1081, 1082 (N.Y. 2005) (holding that failure to inform defendant of community supervision must result in withdrawal of plea without a harmless error analysis). *See also* *People v. Sparber*, 889 N.E.2d 459, 464 (N.Y. 2008) (holding that a court's failure to announce the required period of supervision at the time of sentencing makes the sentence unenforceable).

31. *Catu*, 825 N.E.2d at 1082.

32. 18 U.S.C. § 3583(d) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(a), (c) (2013).

33. U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a).

34. *Id.* § 5D1.3(c)(10) (emphasis added).

which the Fourth Amendment is restricted—sometimes radically so—for parolees.

In deciding what conditions to impose, federal courts should consider, among other things, whether the conditions are “reasonably related to” the offense and the need to deter crime.<sup>35</sup> According to federal statute, conditions should “involve[] no greater deprivation of liberty than is reasonably necessary.”<sup>36</sup> However, as we shall see in Part II.A, Supreme Court jurisprudence tolerates considerably more intrusive conditions than the federal law provides.

Unlike the federal system, in New York the Board of Parole sets the conditions of release.<sup>37</sup> In addition to the typical conditions requiring parolees to report and to refrain from committing crimes, the general conditions of release also include a number of other provisions such as “I will reply promptly, fully, and truthfully to any inquiry of, or communication by, my Parole Officer,” and “I will permit my Parole Officer to visit me at my residence and/or place of employment and I will permit the search and inspection of my person, residence, and property.”<sup>38</sup> Special conditions meant to enhance community safety while also supporting the parolee’s reentry efforts may also be imposed.<sup>39</sup> As we show in Part III, these conditions can be so onerous that they can sometimes encumber a parolee’s ability to find and maintain employment.<sup>40</sup>

Furthermore, New York parolees must promise to “not be in the company of, or fraternize with any person I know to have a criminal record or whom I know to have been adjudicated a Youthful Offender, except for accidental encounters in public places, work, school, or in any other instance with the permission of my Parole Officer.”<sup>41</sup> As we show in Part IV, there is a high variance between the saturation of parolees in different

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35. *Id.* § 5B1.3(b).

36. 18 U.S.C. § 3583(d)(2). *See also* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (using same language).

37. N.Y. PENAL LAW § 70.45(3) (McKinney 2009).

38. New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision, N.Y. STATE DEPARTMENT CORRECTIONS & COMMUNITY SUPERVISION § 3(6) (Sept. 2007) [hereinafter Parole Handbook], <https://www.parole.ny.gov/pdf/handbook6-09.pdf>.

39. Peggy B. Burke, *Collaboration for Successful Prisoner Reentry: The Role of Parole and the Courts*, CORR. MGMT. Q., Summer 2001, at 11, 14 (“Although some conditions are clearly aimed at supporting the [individual] in transition, the total effect may be to create another layer of challenge to what is an already daunting situation.”).

40. *See* Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 448 (2011) (recounting a parolee’s difficulties in attempting to find employment while complying with reporting requirements).

41. Parole Handbook, *supra* note 38, § 3(6).

zip codes of New York; for high-density parolee zip codes, a condition of parole that prevents interactions with other parolees, let alone other convicts in general, is quite difficult to comply with in practice.

### C. REVOCATION OF PAROLE

Any violation of a release condition subjects the parolee to arrest<sup>42</sup> and revocation of community supervision.<sup>43</sup> In the federal system, a parole officer can arrest a parolee without a warrant if the officer has probable cause to believe that the individual has violated a condition of supervised release.<sup>44</sup> A court may also extend its jurisdiction over a parolee by issuing a warrant or summons during the period of supervision.<sup>45</sup> Sanctions for violation of any release conditions range from a warning to full revocation and re-imprisonment, regardless of whether the violation is based on the commission of a new criminal offense or is merely a noncriminal technical violation, such as failing to report or comply with a curfew.<sup>46</sup>

In determining the appropriate disposition, the court must consider the same statutory factors it considered when imposing the initial sentence.<sup>47</sup> Whether or not supervised release will be revoked depends upon the level of the infraction.<sup>48</sup> The two highest of three possible violation levels require the court to revoke release<sup>49</sup> while the third level does not require revocation.<sup>50</sup> If the court revokes release, the Guidelines suggest ranges for the length of imprisonment.<sup>51</sup>

Since the court's punishment for a violation of supervised release is guided by the notion that the offender has committed a "breach" of the court's "trust," the sentence only addresses the violation.<sup>52</sup> If the violation

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42. 18 U.S.C. § 3606 (2012) (providing that a person on supervised release or parole "may be arrested" "[i]f there is probable cause to believe" he or she "has violated a condition of his . . . release"); Parole Handbook, *supra* note 38, § 4. See also JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 87 (2003) (discussing the consequences of a parole violation).

43. 18 U.S.C. § 3583(e)(3) ("The court may [after considering certain factors] revoke a term of supervised release, and require the defendant to serve [time] in prison . . .").

44. *Id.* § 3606. The arrest of a releasee for violating a term of his release is legal only if supported by probable cause. *United States v. Murguia-Oliveros*, 421 F.3d 951, 952–53 (9th Cir. 2005) (citing § 3606).

45. 18 U.S.C. § 3583(i).

46. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1039–42 (2013).

47. 18 U.S.C. § 3583(e).

48. U.S. SENTENCING GUIDELINES MANUAL §§ 7B1.1(a), 7B1.3 (2013).

49. *Id.* § 7B1.3(a)(1).

50. *Id.* § 7B1.3(a)(2).

51. *Id.* § 7B1.4(a).

52. *Id.* ch. 7, pt. A(3)(b), introductory cmt.

is based upon new criminal conduct, punishment for that new conviction rests in the hands of the court adjudicating that new charge. Furthermore, in imposing a sentence for the violation, the court should consider, “to a limited degree,” the “seriousness” of the violation and the offender’s criminal history.<sup>53</sup> The framework implies that “the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct.”<sup>54</sup> In order to avoid double jeopardy and other constitutional problems, courts tie the post-revocation sanction to the original crime, rather than to the violation.<sup>55</sup> We explore the Sixth Amendment implications of these rules in Part II.B.

Should the parole officer opt for revocation, the parolee is entitled to written notice of the violation and a hearing before a “neutral and detached” body,<sup>56</sup> and parolees can call witnesses and testify on their own behalf.<sup>57</sup> However, as we explore in detail in Part II.C, there are many other aspects of the revocation process that permit considerably lowered Fourth, Fifth, and Sixth Amendment rights. In particular, parolees can be arrested with or without a warrant;<sup>58</sup> there is no right to appointed counsel at the revocation hearing unless “fundamental fairness” requires it;<sup>59</sup> the government need only prove a violation by a preponderance of the evidence;<sup>60</sup> hearsay is generally admissible; and, at least in federal courts, the exclusionary rule does not apply.<sup>61</sup>

Just as in the federal system, New York parole hearings are administrative proceedings, and thus parolees can be sent to prison without all of the protections normally attendant at criminal trials. When a parole officer presents evidence that there is probable cause to believe that the parolee has violated release conditions “in an important respect,” the parole

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53. *Id.*

54. *Id.*

55. *Johnson v. United States*, 529 U.S. 694, 701 (2000) (“We therefore attribute postrevocation penalties to the original conviction.”).

56. *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972).

57. *Id.* at 487; *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973).

58. 18 U.S.C. § 3606 (2012) (providing that a person on supervised release or parole “may be arrested” “[i]f there is probable cause to believe” he or she “has violated a condition of his . . . release”).

59. *Gagnon*, 411 U.S. at 790. *See also infra* Part II.C.

60. 18 U.S.C. § 3583(e)(3) (providing that a court may modify or revoke supervised release if it “finds by a preponderance of the evidence that the defendant violated a condition of supervised release”). *See also* *United States v. Maloney*, 513 F.3d 350, 354 (3d Cir. 2008) (same); Parole Handbook, *supra* note 38, § 4(10) (explaining that the same burden of proof applies for parole revocation hearings in New York); *infra* Part II.C.1.

61. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998). *See infra* Part II.C.1 and 3.

board or a designated officer can issue a parole violation warrant.<sup>62</sup> Upon arrest, bail is unavailable throughout the pendency of the revocation process.<sup>63</sup> After execution of the warrant, the parolee must be given written notice of, among other things, the conditions allegedly violated.<sup>64</sup>

A preliminary hearing must be scheduled within fifteen days of the arrest unless the parolee waives that entitlement.<sup>65</sup> There is no right to counsel at this hearing, although one may be provided for those who cannot afford one.<sup>66</sup> In this proceeding, a hearing officer determines whether there is probable cause to believe that the parolee violated a condition of release.<sup>67</sup> If probable cause is found, the hearing officer can either schedule a final revocation hearing or restore the parolee to supervision.<sup>68</sup>

A final revocation hearing must be held within ninety days of the preliminary hearing or the date the parolee waived it.<sup>69</sup> There is a right to counsel at this hearing<sup>70</sup> and the government need only prove the violation by a preponderance of the evidence.<sup>71</sup> If a violation of parole is found, hearing officers have a number of dispositions at their disposal, including restoring the parolee to supervision, incarcerating the parolee but allowing for reinstatement of parole after a certain period of time has been served, or incarcerating the parolee for the balance of the period remaining on his parole, but for no more than five years, except in special cases.<sup>72</sup> If imprisonment is imposed, the parolee's criminal history, the original crime

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62. N.Y. EXEC. LAW § 259-i(3)(a)(i) (McKinney 2010); Parole Handbook, *supra* note 38, § 4(1)–(2).

63. Parole Handbook, *supra* note 38, § 4(3).

64. N.Y. EXEC. LAW § 259-i(3)(c)(iii).

65. *Id.* § 259-i(3)(c)(i); Parole Handbook, *supra* note 38, § 4(3), (14). If there is a conviction on a criminal charge that arises out of the same conduct as the alleged parole violation, this constitutes probable cause that the parolee has violated a condition of release. N.Y. COMP. CODES R. & REGS. tit. 9, § 8005.2(c) (2011).

66. Parole Handbook, *supra* note 38, § 4(6).

67. N.Y. EXEC. LAW § 259-i(3)(c)(iv).

68. *Id.* § 259-i(3)(d).

69. *Id.* § 259-i(3)(f)(i). If the parolee is convicted of a felony and sentenced, parole is revoked by law, so no preliminary or final revocation hearing is held. Parole Handbook, *supra* note 38, § 4(7).

70. N.Y. EXEC. LAW § 259-i (3)(f)(5).

71. *Id.* § 259-i(3)(f)(viii).

72. *Id.* § 259-i(3)(f)(x). *See also id.* § 259-i(3)(g) (“Revocation of presumptive release, parole, conditional release or post-release supervision shall not prevent re-parole or re-release provided such re-parole or re-release is not inconsistent with any other provisions of law.”); N.Y. PENAL LAW § 70.45 (McKinney 2009) (setting forth periods of incarceration for violations of release); *The Sentence Reform Act of 1998—Jenna’s Law*, N.Y. STATE DEPARTMENT OF CORRECTIONS & COMMUNITY SUPERVISION, <https://www.parole.ny.gov/legislation-jl.html> (last visited Apr. 4, 2014) (“Violations of post-release supervision may result in reincarceration for a fixed term between six months and the unserved balance of the post-release supervision term, not to exceed five years.”).



of conviction, the number of prior violations, and the current violative behavior determine the range of imprisonment.<sup>73</sup> For some serious offenses, there can be a mandatory term of at least fifteen months.<sup>74</sup>

In New York, then, parolees facing revocation hearings can be held up to 105 days pending the hearing, and can face additional years of imprisonment if a violation is established. Yet all this occurs under a lower burden of proof and without all of the usual procedural protections that accompany such lengthy terms of incarceration.

#### D. PAROLE AND RECIDIVISM

At the end of 2011, there were approximately 853,900 people on parole in the United States, with 1.1 million in the parole system at some stage during the year.<sup>75</sup> The vast majority were state parolees—744,700, compared to 103,800 federal releasees—but the number of parolees in both jurisdictions is increasing.<sup>76</sup>

Historical trends indicate that many of those released on parole will be reincarcerated. Parolees serving time as a result of a revocation make up over half of the jail population and over one-third of the prison population.<sup>77</sup> Only about half of parolees complete their terms of supervision, including those who are discharged early.<sup>78</sup> Reincarceration rates vary by year and by study, but a significant number of parolees are reincarcerated—42% of parolees returned to jail or prison during their parole term in 2000;<sup>79</sup> in 2006, 16% of parolees were reincarcerated;<sup>80</sup> and in 2011, 20% were reincarcerated, 5% with a new sentence and 13% due to

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73. Parole Handbook, *supra* note 38, § 4(11).

74. *Id.* § 4(12).

75. LAURA M. MARUSCHAK & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2011, at 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus11.pdf>.

76. During 2011, the state parole population grew 1.1 percent while the federal population grew 5.1 percent. *Id.* During that time, parole entries declined by 3.4 percent but exits declined even more, by 5.3 percent. *Id.*

77. Klingele, *supra* note 46, at 5, 17 (using data from PEGGY BURKE ET AL., PEW CTR. ON STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 1 (2007)).

78. MARUSCHAK & PARKS, *supra* note 75, at 1.

79. TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf>.

80. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2006, at 7 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus06.pdf>.

revocation.<sup>81</sup> The numbers may vary, but consistently “a major proportion of offenders failing upon reentry—and returning to prison—are doing so as a result of parole violations and revocations.”<sup>82</sup>

Many revocations are based upon technical violations rather than the commission of new crimes.<sup>83</sup> In fact, in some states, technical violations make up the majority of revocations.<sup>84</sup> As one parole officer put it:

[M]ost of our violations are technical . . . . I mean, if you can’t write up a report, and cite at least a technical violation, you’re not really struggling very hard, because there are so many conditions. There’s got to be something that the guy didn’t do right, right?”<sup>85</sup>

Consequently, the various parole conditions effectively give police officers and parole offices enormous discretion over parolees’ fates—a form of leverage we explore in Part III.B.

#### E. HOW TO ASSESS THE MERITS OF THE PAROLE SYSTEM

From the individual’s point of view, it may seem obvious that even with massive restrictions imposed during the period of parole, parole overall nevertheless operates as a positive for convicts because it gets them out of jail. One problem with this conclusion is that in the federal system, parole *adds* an additional term to a convict’s sentence, rather than reducing it. Given resource constraints, prison overcrowding, and goals of optimal sentencing,<sup>86</sup> it is unlikely that in the absence of parole, sentences would

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81. MARUSCHAK & PARKS, *supra* note 75, at 1.

82. PEGGY BURKE & MICHAEL TONRY, CTR. FOR EFFECTIVE PUB. POLICY, SUCCESSFUL TRANSITION AND REENTRY FOR SAFER COMMUNITIES: A CALL TO ACTION FOR PAROLE 7 (2006), available at <http://www.cepp.com/documents/A%20Call%20to%20Action%20for%20Parole.pdf>.

83. PEW CTR. ON STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 13–14 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf) (showing that across 33 states, 25.5% of parolees returned to prison for technical violations, whereas only 19.9% returned for new crimes).

84. *E.g.*, PEW CTR. ON STATES, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 3 (2007), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/Condition-Violators-Briefing.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Condition-Violators-Briefing.pdf) (“A significant number of returns . . . are solely for violations of the conditions of probation or parole . . . . In some states, these so-called ‘technical’ or ‘condition’ violators account for more than half of all those returned to prison.”); B.J. Reyes, *Isle Parole Failure Rate 43%: A Study Finds That the Majority of Revocations Were for Technical Reasons, Such as Drug Violations, Rather Than for New Convictions*, HONOLULU STAR-BULL. (Aug. 16, 2001), <http://archives.starbulletin.com/2001/08/16/news/index.html>.

85. Klingele, *supra* note 46, at 1035.

86. An extensive economic literature exists that analyzes the most efficient and effective mechanisms of deterring crime by varying the extent of punishment, and other factors. *See, e.g.*, James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?*

remain as high as the combined parole and nonparole period of existing sentences. Even putting this thought experiment aside, the fact that most parolees are returned to prison for technical violations of their parole conditions does not mean that at worst parole simply returns them to neutral. The next subpart shows that parole violations can ultimately cause individuals to serve longer sentences than they would without parole, even extending sentences beyond the legislative maximum. So it is not clear that parole actually reduces prison sentences.

Furthermore, the parole system worsens the institutionalization of individuals—parole contributes to the recidivism statistics described above, not simply because technical violations are easy to establish, but because the extensive parole conditions that we describe in Part III.B make parolees vulnerable to criminal influences. Thus, even for parolees whose initial sentences are shortened, if parole contributes to the probability of their return to prison, that sentence reduction does them little good.

The Supreme Court justifies stringent parole conditions as a Faustian bargain to which the parolees may choose to consent.<sup>87</sup> In fact, as we have seen, parole is often a mandatory addition to a sentence, so the consent argument is misleading. Furthermore, parole conditions have become so onerous as to be counterproductive, leading to greater reincarceration. Thus, whether parole's partial freedom trumps prison's complete incarceration may actually be the wrong way to look at the question, since a parolee's relative freedom may be illusory.

Nevertheless, in discretionary cases, the individual may think probabilistically that he can beat these odds, and we may want to allow him to make that calculation, given his greater knowledge about his character and prospects of successful reentry under parole. But while a parolee may be free to consent to stringent and potentially counterproductive conditions, the community in which he resides does not have the same choice. We show in Part II.A that the rights of the community are also adversely affected by the parole system, and in Part IV we show that the broader neighborhoods in which parolees cluster are targeted by the police for nonrandom stops at a significantly higher rate. The Supreme Court may be

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22 RAND J. ECON. 385, 393 (1991) (theorizing that "increasing penalties may actually increase crime rates"); A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Model of Optimal Fines for Repeat Offenders*, 46 J. PUB. ECON. 291, 302-03 (1991) (arguing that maximal deterrence may require variation in punishment levels on an individual basis); Steven Shavell, *A Model of Optimal Incapacitation*, 77 AM. ECON. REV. 107, 109 (1987) (noting that the optimal sentence may change based on whether the goal of incarceration is either incapacitation or deterrence).

87. See *infra* Part II.B.

willing to infer consent on behalf of the parolee, but surely it cannot extend that inference to the broader community.

Ultimately, we are not proposing that parole in and of itself is necessarily problematic, but the existing parole system is deeply flawed. Parole as it actually operates in the United States today is not the reintegrative, sentence-reducing mechanism that most of us think it is. Parole conditions are so harsh that they undermine the reintegrative goals of parole, do not reduce sentences, and harm the constitutional rights of both individual parolees and the communities in which they live.

## II. IMPACT ON THE PAROLEE: CONSTITUTIONAL RIGHTS

In this part, we examine the parole jurisprudence and demonstrate the adverse impact it has on the constitutional rights of both parolees and the broader community. Subpart A begins with the Fourth Amendment, showing how parole jurisprudence undermines the right to be free from unreasonable searches and seizures not only for individual parolees but also for their families and cotenants. Subpart B turns to the Sixth Amendment, showing that parole can extend parolees' sentences, even beyond the legislatively allowed maximum. Subpart C explores the detrimental effect on procedural rights, including evidentiary rules, revocation and bail, the exclusionary rule, and Miranda rights.

Although the prior literature has addressed most of these issues in isolation, they have seldom, if ever, been considered in terms of their collective effect on atrophying constitutional rights. Pulling all the threads of parole jurisprudence together challenges the common assumption that parole provides a helpful mechanism for the reintegration of criminal offenders into the community.

### A. ATTRITION OF FOURTH AMENDMENT RIGHTS FOR INDIVIDUALS AND COMMUNITIES

The Fourth Amendment applies to parolees, but only in a considerably weakened form. The courts have allowed numerous punitive conditions to be placed on parolees as part of the bargain with the state that lets them exit prison early.

#### 1. *Samson* and the Abolition of the Reasonable Expectation of Privacy

The U.S. Supreme Court has held that people on parole have diminished expectations of privacy that can justify searches and seizures

without the typical probable cause and warrant requirements.<sup>88</sup> Unlike searches and seizures of ordinary citizens, searches and seizures of parolees need only be reasonable.<sup>89</sup> Thus, not only are warrantless searches possible, but police do not need, as they ordinarily would, facts and circumstances that would make a “man of reasonable caution” sufficiently certain that an offense has been committed.<sup>90</sup> Instead, reasonableness requires only a balance between “on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>91</sup> Furthermore, in *Samson v. California*, the Supreme Court deemed parolees to have such a diminished expectation of privacy that even suspicionless searches can be authorized.<sup>92</sup>

The *Samson* rule provides little restriction on police searches. Parolees can be made subject to privacy infringements that may not be reasonable if they involved ordinary citizens,<sup>93</sup> including requiring all parolees to agree to be subject to searches at any time by police and parole officers in order to be eligible for release.<sup>94</sup> These intrusions need only be made pursuant to a rule or regulation “that itself satisfies the Fourth Amendment’s reasonableness requirement,”<sup>95</sup> and must also be “clearly expressed” to the parolee.<sup>96</sup> That is, police do not automatically have the power to search parolees without suspicion, but legislatures can so empower them, and the

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88. *Samson v. California*, 547 U.S. 843, 852 (2006) (“The extent and reach of [parole] conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone.”).

89. *Samson*, 547 U.S. at 847 (quoting *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998)) (affirming the California Court of Appeal’s holdings that “suspicionless searches of parolees are lawful under California law” and that “[s]uch a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing” (internal quotation marks omitted)); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998) (implicitly recognizing the right of parolees to be free from unreasonable searches and seizures). *See also* *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (same, discussing probationers).

90. *Draper v. United States*, 358 U.S. 307, 322 (1958) (Douglas, J., dissenting) (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878)) (“If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.” (internal quotation marks omitted)).

91. *Samson*, 547 U.S. at 848 (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2005)).

92. *Id.* at 847.

93. *Id.* at 863 (Stevens, J., dissenting); *United States v. Grimes*, 225 F.3d 254, 258 (2d Cir. 2000) (“[W]e hold that, like probation, parole justifies some departure from traditional Fourth Amendment standards.”).

94. *Samson*, 547 U.S. at 852 (citing CAL. PENAL CODE § 3067(a) (West 2000)).

95. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

96. *Samson*, 547 U.S. at 852 (“[T]he parole search condition under California law—requiring inmates who opt for parole to submit to suspicionless searches by a parole officer . . . was ‘clearly expressed’ to petitioner.”).

legislation itself is only subject to a reasonableness test.

The reasonableness test offers little meaningful restriction on what legislatures can make parolees subject to. In justifying its lax standard, the *Samson* Court characterized parole as one form of punishment on a continuum, ranging from imprisonment to relative freedom.<sup>97</sup> “[A]n . . . inmate may serve his parole period either in physical custody”—with all of the restrictions that apply in prison—or else he may “elect to complete his sentence out of physical custody and subject to certain conditions.”<sup>98</sup> The Court, then, is characterizing parole, regardless of the extent of the conditions associated with it, as a partial reprieve that prisoners voluntarily consent to, since prison is the alternative.

Under *Samson*, suspicionless searches are almost always reasonable for two reasons. First, the expectation of privacy of parolees is severely diminished because the “extent and reach of these conditions clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone.”<sup>99</sup> On the Court’s circular reasonable expectation of privacy logic, the fact that so many conditions are placed on parolees shows that they must have diminished expectations of privacy, which in turn renders punitive conditions reasonable. Second, by characterizing the conditions as minimally intrusive—since the alternative is prison rather than freedom—the Court minimizes the intrusiveness of any police action. In contrast, the countervailing state interests are considered substantial, since the very high recidivism rate among parolees demonstrates that “most parolees are ill prepared to handle the pressures of reintegration. Thus, most parolees require intense supervision.”<sup>100</sup> However, we show below how punitive parole conditions actually contribute to likely recidivism.

In addition to the above justifications, the Court intimates that parolees can offer no serious constitutional objection to parole conditions because they consented to those conditions. Such consent was indicated by the fact that the inmate “signed an order submitting to the condition and thus was ‘unambiguously’ aware of it . . . . [His] acceptance of a clear and unambiguous search condition ‘significantly diminished [his] reasonable expectation of privacy.’”<sup>101</sup> As we have seen, parole periods are often

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97. *Id.* at 850.

98. *Id.* at 851.

99. *Id.* at 852.

100. *Id.* at 854 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2005)).

101. *Id.* at 852.

mandatory, and so the consent justification is often inapt; in addition, we will see in subpart B below that the core benefit assumed to arise from parole—reduced sentences—can be illusory, and so this inferred consent is difficult to characterize as truly knowing.

It is unclear whether New York takes full advantage of *Samson*'s authorization of suspicionless searches. New York's parole regulations permit warrantless searches, but whether they allow suspicionless searches of parolees is still an open question. In New York, a parolee signs a consent form upon release to permit his parole officer to visit him and to "permit the search and inspection of his person, residence and property."<sup>102</sup> But the New York courts have held that this is not an unconditional consent to any search, applying it only to those conditions that are "rationally and reasonably" related to the parole officer's duty.<sup>103</sup> The burden is on the state to show that the parolee consented to the search.<sup>104</sup> This includes showing that the consent is voluntary and free from implicit or express coercion.<sup>105</sup> In Part III.B, we demonstrate that even though New York law may not fully replicate *Samson*'s full permissiveness, parolees nonetheless find themselves subject to intensive police leverage.

## 2. *Samson* Meets *Randolph*: Loss of Privacy for Family and Cotenants of Parolees

Parole not only reduces the Fourth Amendment rights of individual parolees, but also it erodes the constitutional protections of anyone the parolee happens to live with. It is well established that joint occupants with equal authority to control access to shared residences can consent to searches of common areas and jointly occupied areas.<sup>106</sup> What is not settled is whether, given *Samson*'s permissive attitude toward police searches of parolees' persons and their homes, individuals who live with parolees face a loss of privacy under the Fourth Amendment.

The potential attrition of nonparolee Fourth Amendment interests through the combination of the common authority rules with *Samson*'s presumption of consent is somewhat lightened, though certainly not negated, by the Supreme Court's decision in *Georgia v. Randolph*.<sup>107</sup> That

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102. N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(d) (2011).

103. *People v. Huntley*, 371 N.E.2d 794, 796–97 (N.Y. 1977); *People v. Tony*, 914 N.Y.S.2d 585, 592 (Sup. Ct. 2010).

104. *Tony*, 914 N.Y.S.2d at 592.

105. *People v. Gonzalez*, 347 N.E.2d 575, 580 (N.Y. 1976).

106. *See infra* Part III.B.1.

107. *Georgia v. Randolph*, 547 U.S. 103 (2006).

ruling partially limited the scope of the common authority rule, holding that “a physically present inhabitant’s express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.”<sup>108</sup> This means that any evidence found in a search cannot be used against the nonconsenting party, when the latter is present and objecting. *Randolph* thus raises questions about the effect of *Samson* on nonparolees in the home, but we argue it offers little meaningful protection for nonparolees living with parolees.

If two cohabitants are present, one of whom consents to an otherwise unjustified search while the other “expressly refuses to consent,” the “refusal . . . prevails, rendering the warrantless search unreasonable and invalid as to him.”<sup>109</sup> But this quote illustrates the considerable limits of *Randolph*’s protection for nonparolees living with parolees, in two ways. First, it only applies when both individuals are present and able to object—otherwise, the ordinary common authority rule prevails. Second, *Randolph* only renders *use* of such searches as against the nonconsenting nonparolee impermissible; it does not prevent the search from taking place. Thus it does little to protect nonparolees living with parolees from unreasonable searches and seizures actually being conducted. As described below, this area of the law has previously been criticized for providing little protection from unreasonable searches, since numerous exceptions to the exclusionary rule allow evidence to be indirectly used against an individual for whom it cannot be used directly, such as for credibility purposes.<sup>110</sup> This is particularly true in the parole context, since *Samson* gives an inference of all-but-blanket consent to searches of parolees’ homes. Moreover, the implied consent of the parolee appears to foreclose the possibility that the nonparolee cotenant can obtain any remedy for unjustified searches under federal civil rights laws.

In *Thornton v. Lund*, for example, a court rejected the argument that an officer’s reasonable belief that a parolee lived at a residence diminished the nonparolee cohabitants’ Fourth Amendment rights.<sup>111</sup> But even so, the court noted that the search was valid as against the parolee,<sup>112</sup> refused to allow the nonparolee’s nonconsent to prevent searches such as this, and

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108. *Id.* at 122–23. *See also* *People v. Perez*, 951 N.Y.S.2d 335, 344 (Sup. Ct. 2012) (citing *Randolph*, 547 U.S. at 114) (“The police may not, however, search a residence, even with the consent of one resident, when a co-occupant is physically present and refuses to consent.”).

109. *Randolph*, 547 U.S. at 106.

110. *See infra* Part II.B.1.

111. *Thornton v. Lund*, 538 F. Supp. 2d 1053, 1056–57 (E.D. Wis. 2008).

112. *Id.* at 1059 n.4.



also granted a summary dismissal of the nonparolee's § 1983 damages claim.<sup>113</sup> If anything, then, the *Randolph* compromise of allowing a search but preventing its use legitimates the process of searching the homes of nonparolees living with parolees.

So *Randolph* does little to limit unreasonable searches actually taking place; combined with the fact that *Randolph* does not even apply unless a cotenant happens to be present, this means that *Samson*'s narrow reading of parolee rights has considerable potential adverse impacts on parolees' families and cotenants. When it is considered that at any time, one in three African American men are under some form of criminal justice supervision,<sup>114</sup> the potential impact of *Samson* amounts to potentially lowered rights for entire neighborhoods. Our empirical analysis in Part IV supports this conclusion.

It is also worth considering the feedback effect that *Samson*'s attrition of community rights has back onto the parolee. As will be discussed in Part III.B, stable housing and social and familial relationships are the best predictors of successful reintegration of parolees, but people just released from prison typically will not have the financial resources to pay the rent, and even if they could, landlords may be loath to rent to people with criminal records. Many parolees will have difficulty finding employment for the same reason, and it can be difficult to find jobs that do not conflict with their reporting requirements. Furthermore, federal laws severely restrict the ability of individuals with felony convictions for drugs or violence from living in public housing<sup>115</sup> and receiving public benefits.<sup>116</sup> Thus, most parolees must rely on others to provide them with a place to live. However, the constant risk of state intervention created by *Samson* is a

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113. *Id.* at 1060 ("Given that [parolee William] consented to searches of his residence as a condition of parole and defendants reasonably believed that William lived with plaintiffs, it was reasonable for defendants to believe that they could lawfully search plaintiffs' home over their objections. As such, defendants are immune from damages liability." (citation omitted)).

114. *See supra* note 14 and accompanying text.

115. 42 U.S.C. § 13661(c) (2006) (allowing local housing authorities to refuse housing to people "engaged in any drug-related or violent criminal activity"); *id.* § 13663(a) (prohibiting admission of "any individual who is subject to a lifetime registration requirement" to federally assisted housing); 24 C.F.R. § 960.204(a)(3)–(4) (2012) (applying the same to registered sex offenders and individuals with convictions for the manufacture of methamphetamine). *See also* 42 U.S.C. § 1437d(l)(6) (2006) (permitting housing authorities to evict residents for "drug-related criminal activity on or off such premises" by tenants or guests of tenants); Gwen Rubenstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37, 48 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the effects of federal housing policies excluding people with criminal records).

116. Federal law imposes a lifetime ban on the receipt of welfare and food stamps for those with a felony drug conviction. 21 U.S.C. § 862a(a) (2012).

significant disincentive for others to share their homes with parolees.<sup>117</sup> Consequently, parole conditions can actually undermine the social and familial relationships integral to successful reentry.<sup>118</sup>

#### B. FIFTH AND SIXTH AMENDMENT ATTRITION: PAROLE AS EXTENDING SENTENCES

This subpart describes the statutory and constitutional justifications for the rulings that allow parole to extend sentences, and why this outcome has been held to not violate the Sixth Amendment and other constitutional criminal procedure protections. We provide a number of critiques of the courts' reasoning in developing this jurisprudence, showing how it is internally inconsistent. But the ultimate purpose of this subpart is to place this jurisprudence in the broader context of the counter-productively punitive institution of parole, which undermines parole's reintegrative aims.

##### 1. Statutory Empowerment for Reimprisonment Beyond a Term Authorized by the Conviction Statute

The federal supervised release statute permits reincarceration of an offender for all or part of the remaining time on his supervised release,<sup>119</sup> from one up to five years depending on the class of the original offense.<sup>120</sup> The courts have interpreted this statutory power as permitting them to incarcerate an individual for a prison term that, together with time already served by the parolee, exceeds the total allowed by the statute of conviction. Defendants have challenged these sentences both for improperly interpreting the federal statutes and on constitutional grounds.<sup>121</sup> This section examines the statutory issues; the next section

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117. Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339, 350 (2009).

118. James M. Binnall, *Released from Prison . . . but Placed in Solitary Confinement: A Parolee Reveals the Practical Ramifications of* *Samson v. California*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 86 (2008) ("Suspicionless searches ended my ability to choose with whom to share the intimate details of my life . . . . Secrecy and withdrawal again dominate my life. "); Donna Lee Elm, *Limits on the Search Waiver Term*, PERSP.: J. AM. PROBATION & PAROLE ASS'N, Spring 2003, at 42, 42 ("Throughout the United States, probationers and parolees are subject to release conditions requiring them to submit to search and seizure by authorities.").

119. 18 U.S.C. § 3583(e)(3) (2012) (providing that a court may require a defendant to serve in prison "all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release").

120. The maximum term of re-imprisonment is also limited by the class of the original offense. A class A felony has a five year maximum; a class B felony three years; a class C or D felony two years; and one year for any other kind of offense. *Id.*

121. See, e.g., *United States v. Jamison*, 934 F.2d 371, 373 (D.C. Cir. 1991) (examining both

examines the constitutional arguments.

The courts have discretion over the combined length of parolees' sentences, as they may choose whether to impose concurrent or consecutive sentences of imprisonment for a violation of supervised release, based on a list of factors,<sup>122</sup> and the court has the choice to not give credit for time previously served on post-release supervision.<sup>123</sup> However, the Sentencing Guidelines are more categorical and stricter, providing that if a court imprisons a parolee for violating a condition of release, the sentence *shall* be served consecutively, even if the sentence being served was imposed for the very conduct that violated the terms of release.<sup>124</sup> Although the Sentencing Guidelines constitute only a nonbinding policy statement,<sup>125</sup> they were intended to encourage consecutive, and thus longer, sentences.<sup>126</sup>

Courts have interpreted the combination of these provisions as empowering them to sentence individuals to prison terms that, in total, exceed the legislative maximum provided for in the relevant statute of conviction.<sup>127</sup> In many instances, courts have exploited this power, sentencing parolees to terms of re-imprisonment which, when added to their initial incarceration, exceed the length permitted by the statute of conviction.<sup>128</sup>

The statute of conviction typically specifies the maximum time someone can be imprisoned for the crime. Sentences for supervised release violations relate back to the original offense.<sup>129</sup> Therefore, a number of defendants have argued, the prison sentence for a release violation cannot, as a matter of statutory interpretation, exceed the maximum length

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statutory and Constitutional challenges to this sort of sentence); *United States v. Purvis*, 940 F.2d 1276, 1278 (9th Cir. 1991) (same).

122. 18 U.S.C. § 3553(a) (listing factors); *id.* § 3583(c) (referring to § 3553(a)). *See also supra* Part I.

123. 18 U.S.C. § 3583(e)(3).

124. U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) (2013).

125. *United States v. Johnson*, 640 F.3d 195, 208 (6th Cir. 2011).

126. U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) & cmt. 4.

127. *See, e.g., United States v. Work*, 409 F.3d 484, 488–91 (1st Cir. 2005) (holding that the facts underlying a revocation of supervised release that exceeds the maximum sentence need not be proven beyond reasonable doubt).

128. *See, e.g., United States v. McIntosh*, 630 F.3d 699, 702 (7th Cir. 2011) (“In McIntosh’s case, adding his second reimprisonment (16 months) to his initial imprisonment (41 months) and the reimprisonment from the first violation of supervised release (14 months) gives a total of 71 months. This, of course, is greater than the 60-month statutory maximum authorized for his original offense.”).

129. *Johnson v. United States*, 529 U.S. 694, 701 (2000) (“We therefore attribute postrevocation penalties to the original conviction.”).

provided in the statute of conviction.<sup>130</sup>

The core difficulty with this argument is that the conviction statute is not the sole source of legal authority for imprisoning an offender. In addition, the supervised release statute provides an independent basis for sentencing an offender to a term of release, and, if he violates its restrictions, to additional imprisonment. The Seventh Circuit captured the central statutory issue succinctly, stating:

[A] district court's authority to sentence is not based solely on [the statute of conviction], but on 18 U.S.C. § 3583 as well. That is to say, by statute, a district court is not restricted to only imposing a sentence of up to 60 months; instead, by statute, a district court may impose a 60-month sentence *plus* a three-year term of supervised release, which may include an additional reimprisonment of up to two years should the defendant violate terms of the supervised release.<sup>131</sup>

Every other circuit addressing the issue has reached the same conclusion.<sup>132</sup>

## 2. Reimprisonment Beyond a Term Authorized by the Conviction Statute: Constitutional Issues

Reimprisonment beyond the term authorized by the explicit text of the statute under which the defendant is convicted would seem to be directly at odds with a criminal defendant's Sixth Amendment's procedural rights, the Fifth Amendment's prohibition against double jeopardy, and the Fifth and Fourteenth Amendments' requirement of due process. However, the courts have turned back all constitutional challenges to § 3583, allowing sentences of imprisonment that exceed the maximum allowed by the conviction

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130. See, e.g., *United States v. Robinson*, 62 F.3d 1282, 1283 (10th Cir. 1995) (rejecting the defendant's statutory argument that "because he had served the maximum sentence (five years) provided by 18 U.S.C. § 924(c), the judge had no authority to impose an additional term of imprisonment under 18 U.S.C. § 3583").

131. *McIntosh*, 630 F.3d at 702. See also *United States v. Hoffman*, 733 F. Supp. 314, 315 (D. Alaska 1990) ("Other statutory provisions [than the sentencing provisions], of equal dignity, provide for the possibility of additional time in prison amounting to a total in excess of one year.").

132. E.g., *United States v. Cunningham*, 607 F.3d 1264, 1266–68 (11th Cir. 2010); *United States v. Johnson*, 356 F. App'x 785, 790–92 (6th Cir. 2009) (unpublished opinion); *United States v. Cordova*, 461 F.3d 1184, 1186–88 (10th Cir. 2006); *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224–25 (9th Cir. 2006); *United States v. Dees*, 467 F.3d 847, 854–55 (3d Cir. 2006); *United States v. Carlton*, 442 F.3d 802, 807–10 (2d Cir. 2006); *Work*, 409 F.3d at 489–92. See also *United States v. Wirth*, 250 F.3d 165, 170 n.3 (2d Cir. 2001) ("[It is a] well-settled rule that punishment for a violation of supervised release, when combined with punishment for the original offense, may exceed the statutory maximum for the underlying substantive offense.").

statute to stand.<sup>133</sup> The focus of these decisions has not been on the length of the resulting sentence *per se*,<sup>134</sup> but rather on parolees' procedural rights at their violation hearings.

a. Right to jury trial

The most frequent challenges to violation sentences that exceed the conviction statute's maximum are based on the right to a jury trial recognized in a series of Supreme Court cases culminating in *Apprendi v. New Jersey*<sup>135</sup> and *United States v. Booker*.<sup>136</sup> In these cases, the Court held that the Constitution's guarantee of the right to a jury trial prohibits the imposition of sentences above the statutory maximum other than those based on facts proved beyond a reasonable doubt to a jury.<sup>137</sup> Applying this principle, the Court invalidated several mandatory sentencing schemes, although it allowed judges to impose a sentence on preponderant evidence if the guidelines were merely advisory.<sup>138</sup> Since the supervised release statute permits a judge to reincarcerate someone beyond the maximum permitted by the conviction statute without a jury and with only preponderant evidence, parolees have argued that the statute infringes the right to a jury trial recognized in *Apprendi* and *Booker*.<sup>139</sup>

i. Judicial Fact-Finding

One basis for arguing that these revocation sentences violate the *Apprendi-Booker* principle is that the statute authorizing them allows a judge to punish someone without a jury determination and with only preponderant evidence. The courts have consistently rejected this challenge by asserting that the constitutionality of the whole sentence is a function of the constitutionality of each of its various parts.<sup>140</sup> One part is the "incarcerative term" authorized by the conviction statute; the other part is

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133. *Carlton*, 442 F.3d at 809 (noting some tension between the supervised release statute and the Sixth Amendment right to jury trial).

134. The Court generally avoids "articulat[ing] the scope of the constitutional interest in the substantive criminal law." Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 199 (2005).

135. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

136. *United States v. Booker*, 543 U.S. 220 (2005).

137. *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

138. *Booker*, 543 U.S. at 245.

139. See, e.g., *United States v. Carlton*, 442 F.3d 802, 807 ("Appellant asserts that § 3583(e)(3) is invalid as applied to him because it empowers a district court to revoke his term of supervised release without a jury trial and based on findings that are not proved beyond a reasonable doubt, in violation of his constitutional rights under the Fifth and Sixth Amendments to the Constitution.").

140. *United States v. Work*, 409 F.3d 484, 490 (1st Cir. 2005).

the supervised release term authorized by the supervised release statute.<sup>141</sup> Rather than considering these two parts of the sentence together and assessing their constitutionality, the courts have simply asked whether each element is constitutional standing alone, ignoring the cumulative impact of the two parts.

In *United States v. Work*, for instance, the First Circuit reasoned that at the sentencing stage, the incarceration term was supported by the facts admitted by the defendant during his guilty plea and thus there was no violation of the jury trial right.<sup>142</sup> Furthermore, at the time he was sentenced, the supervised release statute permitted the court to sentence him to supervised release for up to three years. “Since . . . the supervised release statute . . . authorized the court to impose a supervised release term of that duration based solely on the facts admitted in the guilty plea,” the supervised release term also did not violate the defendant’s right to a jury trial.<sup>143</sup>

Having found that the original sentencing court did not violate the defendant’s jury trial right, the *Work* court then turned its attention to the revocation of supervised release. The court argued that the *Apprendi* principle does not apply at the revocation stage because “violation of supervised release is not a separate fact creating an additional penalty on top of a defendant’s original sentence that may go beyond the statutory maximum.”<sup>144</sup> Rather, the “possibility of reimprisonment after a violation” was “part of the original sentence” to begin with.<sup>145</sup> Since the possibility of reimprisonment was in the sentence from the start, it cannot be considered “an additional penalty on top of” the original sentence.<sup>146</sup>

The court acknowledged that the revocation judge extended the offender’s imprisonment after he found release violations by a mere preponderance of the evidence, but concluded that this did not infringe the right to jury trial as recognized by the Supreme Court because the Sixth Amendment does not apply to revocation hearings.<sup>147</sup> Since the releasee has already been convicted of a crime, he need not be “accorded” the same

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141. *Id.* at 489.

142. *Id.* at 491.

143. *Id.*

144. *United States v. McIntosh*, 630 F.3d 699, 703 (7th Cir. 2011).

145. *Id.*

146. *Id.* See also *United States v. Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir. 2006) (“[I]mposition of imprisonment following the revocation of supervised release is part of the original sentence authorized by the fact of conviction and does not constitute additional punishment beyond the statutory maximum.”).

147. *Work*, 409 F.3d at 491 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

“panoply of due process protections” as a criminal defendant.<sup>148</sup> Essentially the *Work* and other courts argue that since revocation occurs subsequent to conviction, they need not address whether the actual imposition of the additional term through revocation violates the Constitution, since the Sixth Amendment does not apply.

Thus the court was arguing first that it is permissible to impose a *potential* additional incarceration term at sentencing that might exceed the statutory maximum for the crime of conviction if imposed, and second that it is permissible to impose the additional term of *actualized* incarceration at the revocation stage, on a preponderance of the evidence and without a jury determination, because the Sixth Amendment no longer applies at the revocation stage.

The two justifications are at odds with one another. To justify the sentence at the sentencing stage, the court insists that the two elements of the sentence must be considered separately. However, to justify the sentence at the revocation stage, the court insists that the two elements must be considered together. If the implicit factual claim in the second argument—that the two aspects of sentencing are one and the same—is accurate, then this directly challenges the evidentiary rule that permits incarceration upon only a preponderance of the evidence.

Also, the court avoided the underlying question at the sentencing stage, by leaping from the *Booker* conclusion that the guidelines cannot be mandatory if they are constitutional to the conclusion that therefore extending sentences beyond the maximum is not a constitutional violation.<sup>149</sup> But it never actually elucidated why, if the revocation term is part of the original sentence, then it need not be proved beyond a reasonable doubt at the first stage. The court then avoided the substance of that argument at the revocation stage, only because the Sixth Amendment does not apply to the revocation. But this only follows if the imposition of the two sentences are separate events—contrary to its earlier position. Nevertheless, other courts have followed this approach.<sup>150</sup>

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148. *Id.* at 492.

149. *Id.* at 492 (“[T]he portions of the sentencing guidelines dealing with revocation of supervised release are merely policy statements. Even before *Booker*, those guidelines were deemed advisory rather than mandatory . . . . Consequently, resort to them cannot constitute *Booker* error.” (citations omitted)).

150. *See, e.g.,* *United States v. McIntosh*, 630 F.3d 699, 703 (7th Cir. 2011) (“[S]upervised release, and the subsequent possibility of reimprisonment after a violation of that release, is a part of the original sentence imposed by the sentencing court following a defendant’s conviction by a jury based on proof beyond a reasonable doubt.”).

Some courts have recognized the conflict between the § 3583 jurisprudence and the *Apprendi-Booker* principle. In *United States v. Carlton*, the Second Circuit upheld a revocation sentence but acknowledged some “tension” between its ruling and the right to a jury determination of all relevant facts.<sup>151</sup> According to the *Carlton* court, the tension arises because, despite the Supreme Court’s contrary assertion, a court “cannot fully attribute the penalty imposed at a revocation hearing to the original conviction.”<sup>152</sup> The facts that justify revocation occur after conviction, and certainly “a jury cannot find facts which the law makes essential to the punishment . . . if those facts have not yet occurred.”<sup>153</sup> Courts are not like the police unit in *Minority Report*, which can incarcerate offenders for “future murder.”

Nonetheless, the *Carlton* court ultimately concluded that there is no violation of the right to jury trial at the revocation hearing because “a sentence of supervised release by its terms involves a surrender of certain constitutional rights and this includes surrender of the due process rights articulated in *Apprendi* and its progeny.”<sup>154</sup> Thus the ultimate justification for the failure of the right to jury fact-finding as protecting against sentences extending beyond the legislative maximum comes down to a notion of the parolee having impliedly consented to the framework of conditions imposed by the state, however punitive it may be. This argument circularly concludes that the Constitution is not violated because courts can presume consent to a system that *would* violate offenders’ constitutional rights but for that consent. We see below that problems with this logic continue to arise when violations of other constitutional provisions are considered, in particular the prohibition on double jeopardy.<sup>155</sup>

## ii. Mandatory Guidelines

A distinct, though closely related, *Apprendi* challenge to revocation sentences contends that judges’ revocation decisions are mandatory under the Sentencing Guidelines. The answer to this challenge is the same as that proffered by *Booker* as to why the Sentencing Guidelines in general did not violate *Apprendi*: the Sentencing Guidelines for revocation were merely advisory before *Booker* and remained so after.<sup>156</sup> Others have argued that

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151. *United States v. Carlton*, 442 F.3d 802, 808 (2d Cir. 2006).

152. *Id.* at 809.

153. *Id.* (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004)) (internal quotation marks omitted).

154. *Id.*

155. *See infra* Part II.B.2.b.

156. *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006) (“Because the



this claim in *Booker* was a disingenuous legalism manufactured to avoid the practical difficulties of the Sentencing Guidelines being unconstitutional under *Apprendi*,<sup>157</sup> and we will not reiterate the argument here.

b. Double Jeopardy

Courts have appealed to some of the same nuances of release revocation to reject double jeopardy challenges. The relevant aspect of the right against double jeopardy “protects [a defendant] against multiple punishments for the same offense.”<sup>158</sup> Courts have circumvented this double jeopardy restriction on expanding sentences beyond the statutory maximum based on the rationale that although parole revocation relates back to the original offense, it is not a second punishment implicating double jeopardy because it merely “modifie[s]” the original sentence.<sup>159</sup> Imprisonment for a violation is not a new punishment, on this logic, but is rather only one “part of the whole matrix of punishment which arises out of a defendant’s original crime.”<sup>160</sup>

This factual characterization of parole revocation, and why it does not violate double jeopardy, is directly at odds with the factual characterization used to justify why parole revocation does not violate the right to jury trial. Previously, we saw that the courts justified parole revocation on the basis that the possibility of reimprisonment was part of the original sentence to begin with. Now, the court is saying that the second punishment, parole revocation, is a *modification* of the original sentence. If the latter claim is true, then the imposition of that sentence without proof beyond reasonable doubt by a jury becomes problematic again.

c. The Indictment Clause

The courts are split on whether the extension of sentencing via parole might conflict with the Indictment Clause of the Constitution.<sup>161</sup> The

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revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under *Booker*.”); *United States v. Dees*, 467 F.3d 847, 854 (3d Cir. 2006) (rejecting a *Booker* challenge to a sentence under § 3583(e)(3) and citing the advisory character of the revocation guidelines).

157. *E.g.*, *Allen & Hastert*, *supra* note 134, at 198–200.

158. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (citing cases).

159. *United States v. Pettus*, 303 F.3d 480, 487 (2d Cir. 2002) (“The requirement that a defendant only be punished once for a particular crime does not mean that this punishment cannot be modified or extended.”).

160. *United States v. Amer*, 110 F.3d 873, 884 (2d Cir. 1997) (quoting *United States v. Paskow*, 11 F.3d 873, 883 (9th Cir. 1993)).

161. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .”).

Indictment Clause requires the government to indict defendants for offenses that “carry an authorized term of imprisonment of over one year.”<sup>162</sup> Thus, the initial imposition of supervised release at sentencing is relevant to the Indictment Clause if the combined terms exceed one year, because supervised release necessarily contains the “*possibility*” that it will be “ultimately revoked.”<sup>163</sup> However, other authority permits charging a misdemeanor that carries a penalty of one year of incarceration and one year of supervised release without an indictment.<sup>164</sup> Since the possibility of reimprisonment is included in supervised release, this authority entails the permissibility of revoking supervised release without an indictment.

The problem with the latter view is that it provides a way around the Indictment Clause for *any* punishment exceeding one year. All that a court needs to do is impose punishment of greater than one year that is conditional on an effectively unavoidable action. For instance, the court could make any fraternization with gang members trigger a condition to extend a punishment beyond a year, knowing that all prisons are rife with gangs and contact with gangs is effectively unavoidable for inmates. Thus if the logic that applies to supervised release is applied to punishments more broadly, the courts will have gutted the Indictment Clause entirely.

Overall, the statutory authority for courts using parole revocation to extend sentences beyond the legislative maximum is quite clear, but the justifications given by the courts for why this practice does not violate the Constitution are muddled. If either of the courts’ factual characterizations of the relationship between parole revocation and initial sentences that are used to justify why sentence extension does not violate the jury fact-finding principle is accurate, then the practice must violate double jeopardy. The courts’ way around this quandary, like their treatment of the Indictment Clause difficulty, renders each of the relevant constitutional provisions effectively nullified. Thus courts are continually recharacterizing the same factual circumstances to avoid constitutional principles they have developed in other contexts. Although some courts have acknowledged these difficulties, more often courts have denied them, consistently upholding and applying imposition of sentences beyond the statutory maximum via parole revocation. Thus the most intuitive justification for parole—that it reduces prison sentences—has been shown to be illusory.

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162. United States v. Purvis, 940 F.2d 1276, 1280 (9th Cir. 1991).

163. *Id.* (emphasis in original).

164. *Id.*

C. PROCEDURAL RIGHTS AT REVOCATION: THE STATE'S LOWERED  
BURDEN

This section examines the jurisprudence of the parole revocation hearing. The Supreme Court has justified limiting parolees' due process and Fifth Amendment rights as well as relaxing evidentiary rules during these hearings on the basis that "revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply."<sup>165</sup> The Court treats parole as a "variation on imprisonment of convicted criminals"<sup>166</sup> and because their freedom is conditional, the Constitution gives states considerable flexibility to structure these proceedings more informally than criminal trials.<sup>167</sup> As we discuss below, however, revocation hearings are often used in lieu of criminal prosecutions when the parolee commits a new criminal offense. To the extent that these proceedings are functioning as criminal trials, these decreased procedural protections essentially allow the state to sentence parolees to significant imprisonment without the constitutional protections that have been deemed indispensable to the fairness and accuracy of criminal trials.

1. Reduced Due Process Protections

The Supreme Court has held that the revocation of parole is not a part of a criminal prosecution because "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."<sup>168</sup> Therefore, parolees have more limited due process rights than defendants in criminal proceedings.<sup>169</sup> These limited rights provide prosecutors with many incentives to proceed by way of revocation rather than a criminal trial. First, the standard of proof at a revocation hearing is a preponderance of the evidence rather than proof beyond a reasonable doubt.<sup>170</sup> Additionally, because these proceedings are deemed more informal than criminal trials, there are no "technical rules of procedure or

165. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

166. *Id.* at 477. *See also* *Samson v. California*, 547 U.S. 843, 850 (2006) ("[P]arole is more akin to imprisonment than probation is to imprisonment.").

167. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998).

168. *Morrissey*, 408 U.S. at 480.

169. *Id.* ("[T]he full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocations."); *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973). While *Gagnon* is a probation violation case, the U.S. Supreme Court treats parole and probation hearings identically. *Id.* at 782.

170. 18 U.S.C. § 3583(e)(3) (2012).

evidence.”<sup>171</sup> For instance, hearsay is often admissible.<sup>172</sup> Finally, although the hearing must be held before an independent party, that party “need not be a judicial officer.”<sup>173</sup> Taken together, when a parolee is engaged in criminal conduct, it is far easier for the state to prove a parole violation than it is to obtain a criminal conviction.

There is some minimal process to which parolees are constitutionally due. They must be given written notice of the alleged violation<sup>174</sup> and are entitled to a preliminary hearing “as promptly as convenient after arrest” to determine whether probable cause exists to believe they are in violation of parole.<sup>175</sup> If probable cause exists, they must be provided a final revocation hearing within a reasonable time to determine whether a violation occurred.<sup>176</sup> One district court has held that parolees may be released on bail pending this final hearing.<sup>177</sup> Finally, at this hearing, they have the right to be present, to introduce evidence,<sup>178</sup> and a “conditional right” to confront witnesses.<sup>179</sup> However, these rights may have little practical effect because the Court has also held that there is no guaranteed Sixth Amendment right to counsel.<sup>180</sup> Without the “guiding hand of counsel,”<sup>181</sup> it is questionable that parolees will be able to represent themselves effectively.

The reduced procedural rights of parolees is a cutting-edge jurisprudential issue. The MacArthur Center for Justice at Northwestern University School of Law brought two lawsuits, both subject to pending consent decrees, in the district of Illinois challenging the failure of the courts to recognize the need for these procedural protections. *M.H. v. Monreal*<sup>182</sup> and *King v. Walker*<sup>183</sup> constitute class-action challenges to the

171. *Gagnon*, 411 U.S. at 786–87.

172. *E.g.*, *United States v. Williams*, 443 F.3d 35, 45 (2d Cir. 2006).

173. *Morrissey*, 408 U.S. at 486.

174. *Id.* at 489.

175. *Id.* at 485.

176. *Id.* at 488 (holding that conducting a final revocation hearing two months after the parolee was arrested is not unreasonable).

177. *United States v. Fernandez*, 144 F. Supp. 2d 115, 118–19 (N.D.N.Y. 2001).

178. *Morrissey*, 408 U.S. at 489.

179. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). *See also* FED. R. CRIM. P. 32.1(b)(2)(c) (“The person [at a revocation hearing] is entitled to . . . an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear . . . .”); *Morrissey*, 408 U.S. at 489 (describing limited right “to confront and cross-examine adverse witnesses”). This conditional right means that hearsay can be admissible.

180. *Gagnon*, 411 U.S. at 790.

181. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

182. *M.H. v. Monreal*, No. 1:12-CV-8523 (N.D. Ill. filed Oct. 23, 2012).

183. Amended Final Consent Decree, *King v. Walker*, No. 06-CV-204 (N.D. Ill. Apr. 24, 2014).

failure to provide juveniles and adults, respectively, with procedural rights, particularly: failure to provide notice and timely hearings, nonprovision of counsel, failures in fact checking, and, in the case of juveniles, failure to provide adult supervision during the process.

## 2. Fifth Amendment Privilege Against Self-Incrimination and *Miranda*

The Fifth Amendment gives individuals a right against being “compelled in any criminal case to be a witness against himself.”<sup>184</sup> This right permits a defendant to refuse to answer questions “in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”<sup>185</sup> However, the Supreme Court has held that parolees do not enjoy the same robust privilege. Parolees can be required to truthfully answer their parole officer’s questions as a condition of parole; and the refusal to answer, even if those answers would be incriminating, can subject the parolee to revocation.<sup>186</sup> Thus, although parolees have the theoretical right to refuse to answer a parole officer’s incriminating questions, exercising that right subjects the parolee to further imprisonment. Given that, as discussed in Part II.A, a parolee can be incarcerated upon revocation for a period that cumulatively exceeds the statutory maximum allowed for the crime that placed him on parole in the first place, parolees face a heavy price for exercising their right to remain silent.

The one benefit of the right against self-incrimination that parolees retain is that their compelled statements cannot be used against them in a criminal trial. Thus, if a parolee makes incriminating statements to his parole officer and he can prove that those answers were compelled, then his responses cannot be used against him in a criminal trial. In order to demonstrate that his answers were compelled, however, the parolee must show that his parole officer “either expressly or by implication, assert[ed] that invocation of the privilege would lead to revocation of [parole].”<sup>187</sup> The Court has interpreted this requirement very narrowly, and thus it is uncertain if a parole condition requiring a parolee to answer his parole officer’s questions truthfully would meet this burden.<sup>188</sup> Furthermore, even if the answers are compelled, those statements are admissible in the parole

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184. U.S. CONST. amend. V.

185. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

186. *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984).

187. *Id.* at 435.

188. *Id.* at 436–38.

revocation hearing.<sup>189</sup>

In sum, parolees who are compelled to make incriminating statements to their parole officers can have those statements used against them in a parole revocation hearing. Furthermore, if they refuse to answer their parole officers' questions because their answers would incriminate them, then they are subject to revocation of parole because their refusal to truthfully answer questions posed by their parole officer is a violation of their conditions of parole. Thus, parolees can find themselves in an untenable position: either exercising their right or failing to exercise their right can lead to imprisonment. Although their compelled statements cannot be used against them in a criminal trial, parolees can still be imprisoned for a significant amount of time as a result of revocation.

When it comes to the parolee's rights to receive the warnings required by *Miranda v. Arizona*,<sup>190</sup> the Supreme Court has held that the typical parole interview does not constitute "custody" despite the fact that parole officers "could compel [a parolee's] attendance and truthful answers."<sup>191</sup> This conclusion is justified because such seeming compulsion alone does not "transform[] a routine interview into an inherently coercive setting."<sup>192</sup> Thus, these non-Mirandized statements can be used against the parolee in a criminal case as well as in parole revocation hearings.<sup>193</sup>

In New York, statements taken in violation of *Miranda* are also admissible in parole revocation hearings.<sup>194</sup> However, the failure of parole officers to inform a parolee of his *Miranda* rights may result in the statements being suppressed in a criminal case. For instance, when a parolee is represented by counsel in a criminal case, parole officers must inform the parolee of his *Miranda* rights prior to questioning him about the crime under indictment.<sup>195</sup> Otherwise, any statements made to the parolee

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189. *Id.* at 435 n.7. *See also* Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992) (en banc) (holding that revocation of supervised release based upon parolee's refusal to answer questions relevant to his status did not violate the Fifth Amendment in part because the officer did not impair the parolee's ability to invoke the privilege at any subsequent criminal proceeding).

190. *Miranda v. Arizona*, 384 U.S. 436 (1966).

191. *Murphy*, 465 U.S. at 431.

192. *Id.*

193. The Second Circuit has not addressed this question directly. The Fifth Circuit has held that when statements are taken outside of the routine interview context and in violation of *Miranda*, they are still admissible in parole revocation hearings because those hearings are administrative in nature. *United States v. Johnson*, 455 F.2d 932, 933 (5th Cir. 1972).

194. *See, e.g.,* *People v. Ronald W.*, 249 N.E.2d 882, 883 (N.Y. 1969) ("[I]t is apparent that the probation officers were not required to give [the probationer] the *Miranda* warnings before [questioning] . . .").

195. *People v. Parker*, 442 N.Y.S.2d 803, 804 (App. Div. 1981).

officer are inadmissible in the criminal case.<sup>196</sup> Furthermore, if a parolee is in custody, then *Miranda* warnings are required even if the parolee is not represented by a lawyer in order for the statements to be used against him in a criminal trial.<sup>197</sup> However, when a parolee is neither in custody nor represented by counsel, New York courts are split on the question of whether parole officers must administer *Miranda* warnings in order for those statements to be admissible in a criminal case.<sup>198</sup>

### 3. The Fourth Amendment's Exclusionary Rule

The circuit courts are split on whether many Fourth Amendment rules apply to parolees. For instance, there is division over whether the Fourth Amendment's oath and affirmation requirement applies to warrants issued in response to alleged violations of community supervision. In the Ninth Circuit, some violation warrants must be based on sworn facts,<sup>199</sup> but the First, Fourth, and Fifth Circuits do not require sworn facts for any violation of an arrest warrant<sup>200</sup> and the Eleventh Circuit rejects the oath requirement for a violation summons.<sup>201</sup> But one of the most central features of the Fourth Amendment—the availability of the exclusionary rule to remedy violations—was determined not to apply to parole revocation hearings by the Supreme Court in *Pennsylvania Board of Probation & Parole v. Scott*.<sup>202</sup> The Court's reasoning in *Scott* rests on assumptions about the operation of the parole revocation process that are inaccurate.

To begin with, the Court concluded that police officers are likely to be unaware that the person searched is a parolee. Thus, because police officers would be deterred by their knowledge that the exclusionary rule applies in criminal trials, no additional deterrence was necessary.<sup>203</sup> However, as we examine in detail in Part III, police and parole officers often conduct joint

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196. *Id.*

197. *People v. English*, 534 N.E.2d 1195, 1195 (N.Y. 1989).

198. *See, e.g., People v. Vann*, 879 N.Y.S.2d 654, 658–60 (App. Div. 2009) (discussing split in the Appellate Divisions).

199. *United States v. Murguia-Oliveros*, 421 F.3d 951, 953 (9th Cir. 2005) (citing 18 U.S.C. § 3583(e)(3)) (“After the period of supervised release has expired . . . the district court can revoke the term of supervised release only if a warrant based on sworn facts was issued within the supervised release period.”); *United States v. Vargas-Amaya*, 389 F.3d 901, 907 (9th Cir. 2004).

200. *United States v. Collazo-Castro*, 660 F.3d 516, 523 (1st Cir. 2011). *See also* *United States v. Brennan*, 285 F. App'x 51, 56 (4th Cir. 2008) (unpublished opinion) (stating that a limited warrant was sufficient in the particular case); *United States v. Garcia-Avalino*, 444 F.3d 444, 447 (5th Cir. 2006) (same). These circuits reject the Ninth Circuit's position, disavowing the requirement that a violation warrant, whether or not it extends the court's jurisdiction, needs to be based on sworn facts.

201. *United States v. Presley*, 487 F.3d 1346, 1348–49 (11th Cir. 2007).

202. *Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357 (1998).

203. *Id.* at 367–68.

searches of parolees, so there is every reason to assume that police officers will be aware of an individual's status, especially if the individual is a person of interest that the police have been investigating. Furthermore, we empirically establish in Part IV that in New York City police target parolee-dense neighborhoods, and not simply because parolees tend to live in high-crime neighborhoods. Thus our study brings into question the first factual prong of *Scott's* justification for the inapplicability of the exclusionary rule in parole hearings.

Targeting parolee-dense neighborhoods makes sense, since lower standards apply to searches of parolees. Parolees are easy targets for police street patrols. If illegally seized evidence is admissible in parole revocation hearings, police will have even stronger incentives to target parolees for searches. Furthermore, since lower standards apply for parole revocation proceedings than for initial criminal convictions, and parolees are subject to significant prison time as a result of such revocations, the benefits of police investigations of parolees are more certain than searches of others. All of these rules together give officers strong incentives to target parolees for searches.

The second spurious factual justification that the *Scott* Court used was that deterring unlawful searches by parole officers was unnecessary because parole officers "are not engaged in the often competitive enterprise of ferreting out crime"<sup>204</sup> and have a "more supervisory than adversarial" relationship with parolees.<sup>205</sup> As will be discussed in Part III.A, while this may have been true at the advent of the parole system, a number of changes to parole since the 1970s make parole officers more like police officers.<sup>206</sup> Furthermore, the number of cases in which parole and police officers working together violate parolees' Fourth Amendment rights belies this claim.<sup>207</sup>

Additionally, proceeding with parole revocation "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."<sup>208</sup> Indeed, the exceptions to the ordinary criminal procedural protections described in this

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204. *Id.* at 368 (quoting *United States v. Leon*, 468 U.S. 897, 914 (1984)).

205. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987)).

206. See *infra* note 232 and accompanying text discussing mission creep.

207. See, e.g., *Scott*, 524 U.S. at 374–375 (Souter, J., dissenting) (noting that parole officers are not "immune to [the] competitive zeal" of police officers); *People v. Mackie*, 430 N.Y.S.2d 733, 735 (App. Div. 1980) (citing cases) (finding that a parole officer "was merely a conduit for doing what the police could not do otherwise" (internal quotation marks omitted)).

208. *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972).



section—significantly lowered burden of proof, relaxed evidentiary rules, and discretionary confrontation rights—provide many reasons to proceed by way of parole revocation instead of a criminal trial. In addition to all of these effects, failing to provide the exclusionary rule as a remedy for parolees at revocation hearings removes a potential deterrent to unlawful police and parole officer conduct.<sup>209</sup>

When all of these various means of diluting parolees' procedural rights during the parole revocation process are taken together, those proceedings begin to look more like traditional criminal trials, but without the protections ordinarily associated with such serious proceedings. Furthermore, since parolees can end up serving significant amounts of time in prison for parole revocations, even beyond the statutory maximum for the crime that led to them being placed on parole in the first place, a prosecutorial goal of seeing a parolee incarcerated for a significant amount of time may be better served by proceeding with a parole revocation hearing instead of a criminal trial.

### III. PAROLE SUPERVISION AND ITS RESULTING VULNERABILITY

The goal of parole is “to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed.”<sup>210</sup> However, as we demonstrate in this part, parole has instead become a system that not only hinders parolees' successful reintegration but also makes them easy prey for those who would take advantage of their diminished status. These perverse effects are the result of a model of supervision that creates incentives to revoke parole, even when the parolee is not engaged in criminal conduct, and that strips parolees of procedural and constitutional protections, leaving them with little recourse against violations of the rights they do possess. Section A explains how the prevailing model of parole supervision can undermine rehabilitation. Using New York as a case study, Section B

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209. Scholars and judges alike are divided on whether the exclusionary rule provides genuine protection in criminal trials. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 595 (2012) (explaining the failure of numerous empirical studies to answer this question).

210. *Morrissey*, 408 U.S. at 477. See also Caplan, *supra* note 3, at 33 (“The original intention of parole supervision was not to revoke parole, but to constantly assess the parolees' progress and to make necessary changes.”); Angela D. West & Richard P. Seiter, *Social Worker or Cop? Measuring the Supervision Style of Probation and Parole Officers in Kentucky and Missouri*, J. CRIME & JUST., no. 2, 2004, at 27, 29 (“Historically and almost exclusively until the late 1960s, probation and parole supervision was focused on restoring offenders to the community.”).

shows how police, criminals, and other community members are able to gain significant leverage over parolees due to parolee vulnerability to incarceration and an erosion of their constitutional and procedural rights. Such leverage undermines parolees' reintegration prospects and erodes their rights even further.

#### A. PUNITIVE SURVEILLANCE

Originally, the goal of community supervision was to give parolees the assistance they required to navigate their reentry into the community successfully. The intent was not to revoke supervision but to constantly re-evaluate their progress and to make adjustments as necessary to facilitate their transition into the community.<sup>211</sup> However, beginning in the 1970s and continuing to the present, this rehabilitative approach to parole has been replaced by a more surveillance-oriented model.<sup>212</sup> Today, many jurisdictions have intensive supervision programs ("ISPs"),<sup>213</sup> a model characterized by closer surveillance of parolees, with an emphasis on finding violations, revoking parole, and returning them to custody.<sup>214</sup> The result is an increased number of revocations for minor technical violations, placing parolees at constant risk of incarceration because the sheer number of technical conditions makes it extremely difficult to avoid a violation.<sup>215</sup> Even law abiding citizens would have difficulty complying with all the

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211. Caplan, *supra* note 3, at 33.

212. *Id.* at 34 (noting that the "social casework approach, which emphasizes assisting parolees with problems, counseling, and working to make sure they succeed," has evolved and is now surveillance-oriented, "emphasiz[ing] law enforcement and the close monitoring of parolees to catch them if they fail and return them to prison"); James Bonta et al., *Exploring the Black Box of Community Supervision*, 47 J. OFFENDER REHABILITATION 248, 248 (2008) (studying 62 probation officers and finding that they "spent too much time on the enforcement aspect of supervision . . . and not enough time on the service delivery role of supervision"); Scott-Hayward, *supra* note 40, at 438 ("[A] surveillance or managerial model, dominated by a risk management philosophy has become more common among supervision agencies."); David M. Stout, *Home Sweet Home?! Maybe Not for Parolees and Probationers When It Comes to Fourth Amendment Protection*, 95 KY. L.J. 811, 833 (2007) ("Though the system's stated purpose is a goal of rehabilitation, '[the] parole services are almost entirely focused on control-oriented activities.'"); West & Seiter, *supra* note 210, at 29 ("Over the past two decades . . . the trend has been an increasing reliance on close surveillance . . . . This style places an emphasis on monitoring . . . compliance . . . and on the detection of violations leading to revocations and returns to custody.").

213. Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, FED. PROBATION, Dec. 1998, at 3, 6.

214. West & Seiter, *supra* note 210, at 29.

215. Scott-Hayward, *supra* note 40, at 436 ("Given all the social, economic, and health deficits of those coming out of prison, it becomes less than surprising that so many parolees are sent back to prison for rule violations. When one combines these problems with conditions that are routinely set for parole . . . a recipe for failure results." (quoting MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 150 (2005))).

conditions imposed upon parolees. For example, parolees face the risk of imprisonment for showing up late to or forgetting an appointment, or getting home late because of unanticipated difficulties, such as a bus failing to arrive, or deciding to spend the night at a girlfriend's house instead of at home.<sup>216</sup> Unsurprisingly, then, it is difficult for parolees to successfully complete community supervision without a single violation.<sup>217</sup>

Four factors account for this change in supervision style. First, there has been a general rise in the punitiveness of the criminal justice system, with a focus on retribution instead of rehabilitation.<sup>218</sup> Second, parole agencies worry that failing to revoke for minor violations would lead to criticism, scrutiny, and a lawsuit should the parolee commit a more serious crime later.<sup>219</sup> Third, the exponential growth of community supervision agencies' caseloads<sup>220</sup> without a concomitant rise in resources also facilitates surveillance over rehabilitation.<sup>221</sup> In New York, officers often have caseloads with at least 200 serious offenders.<sup>222</sup> With caseloads this size, parole officers often lack sufficient time to engage in meaningful rehabilitative efforts, such as helping parolees find counseling services or employment.<sup>223</sup> Even officers who might prefer a more individualized rehabilitation approach are "force[d] . . . to adopt more surveillance-type

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216. These technical violations can result in revocation of parole. *See, e.g.*, *Bolden v. Dennison*, 814 N.Y.S.2d 477, 478 (App. Div. 2006) (finding that a parolee's violation of his curfew constituted a violation of a substantial condition of his parole); *Shaw v. Murray*, 808 N.Y.S.2d 844, 844 (App. Div. 2005) (quoting *People ex rel. Walker v. Hammock*, 435 N.Y.S.2d 410, 410 (App. Div. 1981)) ("[C]onduct of a parolee which is less than criminal conduct may result in a revocation of parole where such conduct is proscribed by the conditions imposed by his parole.").

217. For example, in a six-year study of fifteen youths in a Philadelphia neighborhood, only one person out of fifteen successfully completed parole. Goffman, *supra* note 117, at 345.

218. Caplan, *supra* note 3, at 34; Scott-Hayward, *supra* note 40, at 439.

219. Richard P. Seiter, *Prisoner Reentry and the Role of Parole Officers*, FED. PROBATION, Dec. 2002, at 50, 51.

220. Caplan, *supra* note 3, at 34 ("In the 1970s, parole officers handled caseloads averaging 45 offenders; today it is up to 70 or more."); Mark Jones & John J. Kerbs, *Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations*, FED. PROBATION, June 2007, at 9, 11 ("[C]aseloads . . . contained an average of 141 offenders and a maximum of 4000 offenders . . ."); Scott-Hayward, *supra* note 40, at 438-39.

221. Caplan, *supra* note 3, at 34-35; West & Seiter, *supra* note 210, at 30.

222. Todd R. Clear & Edward J. Latessa, *Probation Officers' Roles in Intensive Supervision: Surveillance Versus Treatment*, 10 JUST. Q. 441, 443 (1993). A recent survey of parole officers in Manhattan and the Bronx found that 84 percent had excessive caseloads. SCOTT M. STRINGER, OFFICE OF THE MANHATTAN BOROUGH PRESIDENT, *BREAKING PAROLE: AN ANALYSIS OF THE NEW YORK STATE DIVISION OF PAROLE'S CASELOAD MANAGEMENT GUIDELINES, REENTRY NET 1* (Dec. 2006), <http://www.reentry.net/public2/library/attachment.92944>. Furthermore, 87 percent of officers surveyed characterized their own caseloads as "too high." *Id.*

223. West & Seiter, *supra* note 210, at 30.

activities to move offenders through the system.”<sup>224</sup> Because of these institutional constraints, parole officers function more as police officers than social workers.<sup>225</sup> In fact, these high caseloads can create incentives to revoke parolees for technical violations, since revocation means fewer cases.

The final reason for the move to a more punitive approach is the growth of partnerships between parole agencies and the police.<sup>226</sup> Parole-police partnerships are being promoted by the Community Oriented Policing Services (“COPS”) of the U.S. Department of Justice.<sup>227</sup> According to COPS, key benefits of such partnerships include “intelligence and information sharing”<sup>228</sup> and “joint efforts in the discovery of criminal activity.”<sup>229</sup> These partnerships can also alleviate resource constraints within parole offices since the police can help monitor parolees.<sup>230</sup> In jurisdictions that already have these partnerships, police and probation officers participate in joint ride-alongs and home searches.<sup>231</sup>

However, these partnerships contribute to “mission creep,” whereby parole officers focus on law enforcement objectives over their counseling roles.<sup>232</sup> As one police officer stated when asked to describe the benefits of

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224. *Id.* at 51 (internal quotation marks omitted). *See also* Caplan, *supra* note 3, at 35 (finding that although some officers think that rehabilitation functions are more effective, they use surveillance instead because of management pressure to address the concerns of a more punitive public as well the pressures of their caseloads).

225. Scott-Hayward, *supra* note 40, at 439 (“[P]arole officers look less like social workers and more like police officers.”).

226. West & Seiter, *supra* note 210, at 30.

227. *See, e.g.,* JESSE JANNETTA & PAMELA LACHMAN, CMTY. ORIENTED POLICING SERVS., PROMOTING PARTNERSHIPS BETWEEN POLICE AND COMMUNITY SUPERVISION: HOW COORDINATION CAN REDUCE CRIME AND IMPROVE PUBLIC SAFETY 3 (2011), available at <http://ric-zai-inc.com/Publications/cops-p203-pub.pdf> (suggesting that supervision agencies can “enhance their role in improving public safety” by working with law enforcement).

228. *Id.* at 4.

229. *Id.* at 6.

230. *Id.* at 23.

231. *Id.* at 10–11.

232. Ronald P. Corbett, Jr., *Probation Blue? The Promise (and Perils) of Probation-Police Partnerships*, CORRECTIONS MGMT. Q., Summer 1998, at 31, 37–39 (noting that probation-police partnerships can lead to mission creep, mission distortion, and organizational lag); David Murphy, *Police Probation Partnerships: Managing the Risks and Maximizing Benefits*, JUST. POL’Y J., Spring 2008, at 1, 17 (noting that as a result of police partnerships, “officers reported feeling that they were expected (by their law enforcement counterparts) to emphasize aggressive enforcement priorities at the expense of their service and mentoring obligations”). *See also* Clear & Latessa, *supra* note 222, at 444 (“Most studies of roles in community supervision recognize two distinct functions: service delivery (assistance) and law enforcement (control or surveillance).”); Bitna Kim et al., *Predictors of Law Enforcement Agencies’ Perceptions of Partnerships with Parole Agencies*, 16 POLICE Q. 245, 249 (2013) (“[P]robation officers would lose sight of their service responsibilities by working with police to

partnering with probation officers, “I think, just being able to access who their offenders are and [find out] what their restrictions are. And then having them as a tool to get into their houses that we wouldn’t otherwise be able to access for people.”<sup>233</sup>

While reincarceration for new criminal offenses is to be expected, the more punitive approach that is currently in vogue creates a revolving door to prison even for technical violations, and that is problematic for a number of reasons. First, reincarceration can stymie any progress towards rehabilitation the parolee has already made. There is wide agreement that stable housing<sup>234</sup> and strong social relationships<sup>235</sup> are important to successful integration. Yet, arrests for technical violations can disrupt relationships with family and friends as well as cause parolees to lose jobs or educational opportunities, even if parolees are eventually reinstated to supervision. In this way, the surveillance model hinders rehabilitation by disrupting socialization back into the community. Second, arrests for technical violations also adversely affect the parolee-parole officer relationship, as parolees learn that parole officers are not there to help but rather to police them in order to return them to custody. If parolees feel constrained about sharing challenges they are experiencing with their

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conduct heightened supervision of probationers.”); Bitna Kim, Jurg Gerber & Dan Richard Beto, *Listening to Law Enforcement Officers: The Promises and Problems of Police-Adult Probation Partnerships*, 38 J. CRIM. JUST. 625, 627 (2010) (“The partnerships may become a source of incentives for probation officers to gravitate toward a greater emphasis on the pursuit of law enforcement public safety priorities at the expense of their responsibilities to serve as mentors, service brokers, agency liaisons, and advocates for the offenders they supervise.”).

233. Murphy, *supra* note 232, at 18 (emphasis omitted). See also David Murphy & Faith Lutze, *Police-Probation Partnerships: Professional Identity and the Sharing of Coercive Power*, 37 J. CRIM. JUST. 65, 66 (2009) (noting that “if greater emphasis is placed on law enforcement objectives, [a] partnership will primarily serve the interests of the police” rather than probation officers).

234. JANNETTA & LACHMAN, *supra* note 227, at 6 (“[P]arolees are more likely to be successful if they can acquire stable housing and employment, abstain from drug and alcohol use, and engage in pro-social activities . . .”). See also DEMELZA BAER ET AL., URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE’S PRISONER REENTRY PORTFOLIO 4, 8, 11, 13 (2006), available at [http://www.urban.org/uploadedpdf/411289\\_reentry\\_portfolio.pdf](http://www.urban.org/uploadedpdf/411289_reentry_portfolio.pdf) (concluding that stable housing is one of the most important components of successful reentry).

235. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION 21 (2007) (noting that the “association of marriage with lower crime among men has been widely reported in both quantitative and qualitative studies”); PETERSILIA, *supra* note 42, at 41 (“Reviews of prisoners’ family relationships yield two consistent findings: male prisoners who maintain strong family ties during imprisonment have higher rates of post-release success, and men who assume husband and parenting roles upon release have higher rates of success than those who do not.”); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 13, 19–20 (2001) (noting that desistance from crime is influenced by a number of factors, the most important of which appear to be strong social bonds including marriage, family ties, and employment).

officers, then officers will not obtain the information necessary to get parolees to treatment or to other programs that can aid in their reentry.

These consequences of ISPs may well be worth the price parolees pay if it protects public safety by reducing recidivism. However, the evidence points to the contrary. One study found that although the surveillance model was effective in identifying parole violations, it did not reduce recidivism.<sup>236</sup> Parole officers report that the rehabilitation model was more effective in providing assistance to parolees, while the surveillance approach simply helps officers catch parolees engaged in technical violations.<sup>237</sup> Furthermore, a meta-analysis of existing studies found that “control-oriented programs—those seeking to deter offenders through surveillance and threats of punishment—were ineffective.”<sup>238</sup> In fact, “[e]xcept in a few instances, there is no evidence that these programs are effective in reducing crime as measured by official record data.”<sup>239</sup> Some parole scholars conclude that ISPs produce “equal to or higher rates of recidivism than regular probation or prison sentences.”<sup>240</sup> Even some proponents of ISPs acknowledge that “technical violations [are] a weak predictor of future criminality.”<sup>241</sup> Thus, while the control and surveillance model of supervision is likely significantly responsible for the high rates of revocation,<sup>242</sup> “research repeatedly disproves that violating parolees for technicalities reduces new criminal arrests. In fact, new criminal arrests linked to former inmates constitute less than 3 percent of all arrests nationwide.”<sup>243</sup>

Overall, the current supervision model increases the risk of reincarceration and hinders progress towards successful socialization.

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236. Caplan, *supra* note 3, at 34.

237. Richard P. Seiter & Angela D. West, *Supervision Styles in Probation and Parole: An Analysis of Activities*, 38 J. OFFENDER REHABILITATION 57, 68–70, (2003).

238. Joan Petersilia, *What Works in Prisoner Reentry? Reviewing and Questioning the Evidence*, FED. PROBATION, Sept. 2004, at 4, 6 (“[I]ncreased monitoring in the community (e.g., intensive probation, electronic monitoring) did not alone reduce recidivism.”). *See also* Petersilia, *supra* note 213, at 6 (finding that while parolees are “watched more closely, . . . ISP supervision did not decrease subsequent arrests”).

239. Petersilia, *supra* note 213, at 6. *See also* West & Seiter, *supra* note 210, at 31 (citing a study finding that increasing surveillance may not reduce recidivism).

240. Benjamin Steiner, *Treatment Retention: A Theory of Post-Release Supervision for the Substance Abusing Offender*, FED. PROBATION, June 2004, at 24, 26.

241. *Id.*

242. West & Seiter, *supra* note 210, at 31.

243. Caplan, *supra* note 3, at 34 (citations omitted).

## B. LEVERAGE

In this subpart, we examine the impact of the punitive nature of parole supervision, focusing in detail on New York City's rules and their practical effects. Since our empirical analysis is of stop and frisk practices in New York City, a brief analysis of the rules of searches of parolees as applied in New York City is appropriate. We expect variance in police-parolee relations in different locations—for instance between cities and less populous areas; however, New York only partially takes advantage of the many means of leverage over parolees that we described in Parts I, II, and III.A. For instance, it does not allow entirely suspicionless searches, even though the U.S. Supreme Court has approved that practice. Parolees in New York in fact have more rights against unreasonable searches and seizures than parolees in other jurisdictions;<sup>244</sup> yet we show that even so, there are still many points of leverage available against parolees in New York, which undermine the ultimate goals of parole. Thus, New York constitutes a good vehicle for examining the impact of parole jurisprudence.

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244. *E.g.*, S.C. CODE ANN. § 24-21-640 (Supp. 2013) ("Before an inmate may be released on parole, he must agree in writing to be subject to search or seizure, without a search warrant, with or without cause, of the inmate's person, any vehicle the inmate owns or is driving, and any of the inmate's possessions by: (1) any probation agent employed by the Department of Probation, Parole and Pardon Services; or (2) any other law enforcement officer."); UTAH CODE ANN. § 77-23-301(1) (Supp. 2013) ("An inmate who is eligible for release on parole shall, as a condition of parole, sign an agreement . . . that the inmate, while on parole, is subject to search or seizure of the inmate's person, property, place of temporary or permanent residence, vehicle, or personal effects while on parole: (a) by a parole officer at any time, with or without a search warrant, and with or without cause; and (b) by a law enforcement officer at any time, with or without a search warrant, and with or without cause . . ."); W. VA. CODE R. § 90-2-2(2.17) (2007) ("Parolees or probationers shall submit to a search without warrant of his or her person, place of residency or motor vehicle by his or her parole officer for supervision purposes at any time during the parole period."). *See also* *People v. McCullough*, 6 P.3d 774, 781 (Colo. 2000) (en banc) ("[A] warrantless parole search is constitutional, even in the absence of 'reasonable grounds,' if the search meets the following requirements: (1) it is conducted pursuant to any applicable statute; (2) it is conducted in furtherance of the purposes of parole, i.e., related to the rehabilitation and supervision of the parolee; and (3) it is not arbitrary, capricious, or harassing."); *State v. Devore*, 2 P.3d 153, 156 (Idaho Ct. App. 2000) (quoting *State v. Gawron*, 736 P.2d 1295, 1297 (Idaho 1987)) ("The 'reasonable grounds' requirement for warrantless searches by probation or parole officers does not apply when the subject of the search has entered into a probation or parole agreement that includes a consent to warrantless searches."); *People v. Wilson*, 885 N.E.2d 1033, 1043 (Ill. 2008) (quoting *Samson v. California*, 547 U.S. 843, 857 (2006)) ("[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee."); *Robinson v. State*, 312 So. 2d 15, 18 (Miss. 1975) ("[T]he parole authorities may subject [a parolee], his home and his effects, to inspection and search as may seem advisable to them."); *State v. Zeta Chi Fraternity*, 696 A.2d 530, 540 (N.H. 1997) (treating probation and parole as legally on par and concluding that warrantless probation searches are permissible if they further the purposes of probation); *State v. Turner*, 297 S.W.3d 155, 157 (Tenn. 2009) ("[P]arolees who are subject to a warrantless search condition may be searched without reasonable or individualized suspicion.").

### 1. Reduced Fourth Amendment Rights

Parolees in New York have a right to be free from unreasonable searches and seizures.<sup>245</sup> Importantly, however, in determining reasonableness, the individual's status as a parolee is a relevant consideration, and may in fact be determinative.<sup>246</sup> Courts will "weigh the interference . . . entail[ed] against the precipitating and attending conditions, including a parolees' diminished privacy expectations and the conditional nature of parolees' liberty."<sup>247</sup> As New York courts repeatedly emphasize, "what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is."<sup>248</sup> Such a position may be entirely reasonable, but we show that in combination with other punitive parole conditions, such rules become counter-productive.

Parolees give consent to searches of their residence, person, and property as a standard condition of release,<sup>249</sup> although this consent only applies to searches that are rationally and reasonably related to the duties of the parole officer,<sup>250</sup> which the burden is on the state to show.<sup>251</sup> Furthermore, a parolee's joint occupants who have equal authority to control access to shared residences can consent to searches of jointly occupied areas.<sup>252</sup>

Stops and frisks as well as searches conducted by a parolee's own parole officer are reasonable if the search is "rationally and reasonably related to the performance of the parole officer's duty," including the

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245. *People v. Huntley*, 371 N.E.2d 794, 796 (N.Y. 1977).

246. *Id.* at 797.

247. *People v. Porter*, 952 N.Y.S.2d 678, 681 (App. Div. 2012) (citations omitted) (internal quotation marks omitted).

248. *Id.* (quoting *People v. Burry*, 859 N.Y.S.2d 499, 501 (App. Div. 2008)). *See also* *U.S. ex rel. Santos v. N.Y. State Bd. of Parole*, 441 F.2d 1216, 1218 (2d Cir. 1971) ("A search which would be unlawful if directed against an ordinary citizen may be proper if conducted against a parolee.").

249. A parolee signs a consent form upon release which mandates that the parolee "will permit the search and inspection of his person, residence and property." N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(d) (2011).

250. *Huntley*, 371 N.E.2d at 796; *People v. Tony*, 914 N.Y.S.2d 585, 592 (Sup. Ct. 2010).

251. *Tony*, 914 N.Y.S.2d at 592. *See also* *People v. Gonzalez*, 347 N.E.2d 575, 580 (N.Y. 1976) (holding that consent must be voluntary and free from implicit or express coercion).

252. *People v. Cosme*, 397 N.E.2d 1319, 1322 (N.Y. 1979); *People v. Miller*, 572 N.Y.S.2d 149, 150–51 (App. Div. 1991); *People v. Buggs*, 528 N.Y.S.2d 659, 660 (App. Div. 1988). *See also* *People v. Lownes*, 837 N.Y.S.2d 367, 368–69 (App. Div. 2007) (finding that a girlfriend living with a parolee may also give consent to search their residence); *People v. Carrington*, 807 N.Y.S.2d 89, 90 (App. Div. 2006) (same); *People v. Adams*, 665 N.Y.S.2d 991, 992–93 (App. Div. 1997) (citing *United States v. Matlock*, 415 U.S. 164, 169 (1974)) (finding that a search of a parolee's bedroom in his father's house was reasonable based upon the father's consent when the father was a "joint occupant" and the space searched was "jointly occupied").



officer's duties to reintegrate the parolee into society, prevent parole violations, and detect and prevent crimes.<sup>253</sup> New York police officers do not have the same latitude: searches by police officers must meet the traditional standards of probable cause or reasonable suspicion, as the case may be, although the parolee's status is relevant to the reasonableness determination.<sup>254</sup> We show below that the reality can be more permissive than is required by law.

Additionally, if a police officer is working with parole officers, the standard for stopping and frisking a parolee is even lower than the reasonable suspicion standard. When working together, the more permissive parole officer standard applies as long as the parole officer is investigating a parole violation.<sup>255</sup> Even when the parole officer is not present, a police officer acting under the "fellow officer rule" may frisk a parolee without reasonable suspicion if a parole officer directs the police officer to do so and the purpose of the frisk is "rationally and reasonably" related to the parole officer's duty.<sup>256</sup>

As a result of the greater latitude parole officers have to conduct searches, courts will carefully scrutinize the parole officer's role in searches involving both parole and police officers.<sup>257</sup> In joint searches, if parole officers are simply acting as agents of the police, the search is unreasonable unless probable cause or reasonable suspicion exists.<sup>258</sup> But

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253. *Huntley*, 371 N.E.2d at 797. *See also* *People v. Driscoll*, 957 N.Y.S.2d 476, 477 (App. Div. 2012) (addressing stops and frisks); *People v. LaFontant*, 847 N.Y.S.2d 650, 651 (App. Div. 2007) (holding that a search of a parolee's cell phone by a parole officer was unreasonable because it was not rationally and reasonably related to the parole officer's duties).

254. *People v. Carney*, 444 N.E.2d 26, 27 (N.Y. 1982) (stating that officer must have knowledge of some fact or circumstance that suggests the suspect is armed or poses a threat to safety for authorization to frisk); *People v. Caicedo*, 893 N.Y.S.2d 609, 609 (App. Div. 2010) (quoting *People v. Batista*, 672 N.E.2d 581, 583 (N.Y. 1996)) (holding that to conduct a protective pat frisk, an officer "must have knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety").

255. *Carrington*, 807 N.Y.S.2d at 90 ("Although the parole officers were cooperating with the police, who were investigating a homicide, the record fails to support defendant's assertion that the parole officers were acting solely on behalf of the police.").

256. *People v. Porter*, 952 N.Y.S.2d 678, 682 (App. Div. 2012) (holding that a parole officer directing police to search was reasonable after receiving a confidential informant tip that a parolee was carrying a gun and was out past his curfew). *But see Driscoll*, 957 N.Y.S.2d at 477 (stating that a police officer frisk of a parolee was unsupported by reasonable suspicion).

257. *People v. Peterson*, 777 N.Y.S.2d 48, 49 (App. Div. 2004); *People v. Felder*, 708 N.Y.S.2d 774, 775 (App. Div. 2000); *People v. Candelaria*, 406 N.Y.S.2d 783, 786 (App. Div. 1978).

258. *Candelaria*, 406 N.Y.S.2d at 786. *See also Huntley*, 371 N.E.2d at 797 (holding that looking for evidence for not reporting to a meeting when a parolee did not appear unable to leave his home was reasonable); *People v. Lloyd*, 951 N.Y.S.2d 639, 640 (App. Div. 2012) (holding that looking for a parolee whose ankle bracelet had stopped transmitting a signal was reasonable); *People v. Johnson*, 942

otherwise the search will be reasonable, even if police are present, as long as the search is rationally and reasonably related to the parole officer's duties.<sup>259</sup>

For instance, in *People v. Taylor*, police suspected Taylor, a parolee, of involvement in a robbery.<sup>260</sup> The officers called Taylor's parole officer in order to obtain his address. However, they did not disclose their suspicions.<sup>261</sup> During their conversation, the parole officer informed the police that he was going to Taylor's residence to check compliance with a 10 p.m. curfew and asked the officers to accompany him.<sup>262</sup> Upon finding that Taylor was not at home, it was clear that Taylor was in violation of his mandated curfew. As a result, the parole officer conducted a search of the residence in order to find information about his whereabouts. During the search, Taylor called and made incriminating statements. At his subsequent trial on robbery charges, Taylor sought to have his statements suppressed as the fruit of an unlawful search.<sup>263</sup> He argued that the "police officers illegally and improperly bypassed the requirement of obtaining a valid search warrant by masking the visit [to his] residence and search of his room as a parole visit."<sup>264</sup> The court held that his statements were admissible because the initial trip to Taylor's residence was to "pursu[e] parole-related objectives," and although police officers were present, the search was reasonably and rationally related to the parole officer's duties.<sup>265</sup>

Although parolees have a right to be free from unreasonable searches and seizures, whether the exclusionary rule applies to parole revocation proceedings in New York is an open question. In *People ex rel. Piccarillo v. New York State Board of Parole*,<sup>266</sup> the New York Court of Appeals held that the exclusionary remedy applies to all illegally obtained evidence during the parole revocation process. However, subsequent to that decision, the U.S. Supreme Court decided *Pennsylvania Board of Probation &*

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N.Y.S.2d 738 (App. Div. 2012) (holding that unlocking and searching a parolee's car and finding contraband in the console was reasonable when independently justified by a parole officer).

259. *Carrington*, 807 N.Y.S.2d at 89 ("Although the parole officers were cooperating with the police, who were investigating a homicide, the record fails to support defendant's assertion that the parole officers were acting solely on behalf of the police."); *People v. Lopez*, 733 N.Y.S.2d 154, 154 (App. Div. 2001); *Felder*, 708 N.Y.S.2d at 775.

260. *People v. Taylor*, 947 N.Y.S.2d 871, 872 (App. Div. 2012).

261. *Id.*

262. *Id.* at 872–73.

263. *Id.* at 873.

264. *Id.* at 872 (internal quotation marks omitted).

265. *Id.* at 873.

266. *People ex rel. Piccarillo v. N.Y. State Bd. of Parole*, 397 N.E.2d 354, 358 (N.Y. 1979).

*Parole v. Scott*, which held that the exclusionary rule was not constitutionally mandated in parole hearings.<sup>267</sup> Since *Scott*, the lower New York courts are split on the issue of whether *Piccarillo* is still good law. At least two trial courts have interpreted *Piccarillo* to hold that the exclusionary rule in parole revocation hearings is a state constitutional right and thus is still applicable post-*Scott*.<sup>268</sup> However, at least one trial court has held that *Piccarillo* did not create a right to the exclusionary rule under the state constitution.<sup>269</sup>

Even if the exclusionary rule does apply, it is well established that there are many ways around that constraint.<sup>270</sup> Illegally garnered evidence can nonetheless be used to prosecute third parties who lack standing to exclude, to impeach a defendant's or witness's credibility, to prosecute noncriminal cases, to find other evidence,<sup>271</sup> to recover contraband, to harass a suspect, or to induce a subject to become a police informant.<sup>272</sup> This is even more strongly the case for searches of parolees because parole revocation hearings are administrative proceedings<sup>273</sup> and administrative hearing officers have no authority to rule on constitutional issues.<sup>274</sup> Thus, unless there has been a "prior judicial determination that evidence presented at a preliminary parole revocation hearing has been illegally obtained, a Hearing Officer may consider that evidence on the issue of probable cause."<sup>275</sup> Additionally, a "subsequent judicial determination

267. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998).

268. People ex rel. Taylor v. Warden, No. 260531-2011, 2011 N.Y. Misc. LEXIS 6165, at \*6 (Sup. Ct. Dec. 23, 2011) (unpublished decision); State ex rel. Thompson v. Harder, 799 N.Y.S.2d 353, 355 n.2 (Sup. Ct. 2005).

269. People ex rel. Gordon v. O'Flynn, 775 N.Y.S.2d 507, 513–14 (Sup. Ct. 2004).

270. See Jacobi, *supra* note 209, at 597 (describing the manifold benefits of conducting searches even if the results of those searches are excluded at trial).

271. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 734–35 (1970).

272. Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1370–71 (2008).

273. People ex rel. Maiello v. N.Y. State Bd. of Parole, 480 N.E.2d 356, 357 (N.Y. 1985); People ex rel. Piccarillo v. N.Y. State Bd. of Parole, 397 N.E.2d 354, 356 (N.Y. 1979).

274. People ex rel. Zeigler v. Warden, 562 N.Y.S.2d 677, 678 (App. Div. 1990) ("[T]he proper forum for petitioner to challenge seizure of the physical evidence was in a suppression court, rather than before the Division of Parole."); Tejada v. Christian, 422 N.Y.S.2d 957, 959 (App. Div. 1979) (holding that a housing authority hearing officer correctly ruled that he had no authority to rule on a constitutional issue related to allegations of an illegal search and seizure).

275. People ex rel. Victory v. Travis, 734 N.Y.S.2d 749, 751 (App. Div. 2001). However, a parolee must be given the opportunity to litigate suppression issues. *Id.* If the parolee does not have a pending criminal case, he or she can bring a habeas corpus proceeding for a determination of whether evidence was illegally seized. People ex rel. Coldwell v. N.Y. State Div. of Parole, 506 N.Y.S.2d 761, 763 (App. Div. 1986) (holding that a lower court erred in failing to hold a hearing on a parolee's habeas proceeding made during the pendency of his preliminary hearing). If the parolee has a pending criminal

suppressing that evidence does not undermine the validity of the probable cause determination” because “evidence that has not been suppressed may supply the basis for a probable cause determination at a preliminary parole revocation hearing.”<sup>276</sup> Once probable cause is found, the parolee must remain in custody pending his final revocation hearing.

## 2. Vulnerability to Manipulation

The ease with which parolees can lose their conditional freedom and the minimal procedural and substantive protections available to them gives others considerable leverage over them. A phone call to a parole officer reporting that a parolee has violated his curfew or was drinking alcohol in his home can be sufficient reason for parole officers to conduct a warrantless search of the parolee’s home without probable cause or to conduct a stop and frisk on the street without reasonable suspicion.

Police may even be asked to accompany the parole officer’s search, in which case the lower standard also covers their actions. NYPD officers sometimes use partnerships with parole officers to essentially commandeer joint home searches.<sup>277</sup> The cover of parole officers’ broader search entitlements is exploited by police to conduct otherwise illegal searches, harass parolees, and expand searches beyond the parolee and areas within his control,<sup>278</sup> a practice known as the “stalking horse.”<sup>279</sup> While New York state courts have suppressed evidence in criminal prosecutions as a result of these types of searches,<sup>280</sup> the Second Circuit has rejected “stalking horse” challenges to joint searches conducted without a warrant.<sup>281</sup>

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case based on the same facts underlying the alleged parole violation, he or she can ask for an adjournment of the parole hearing in order to litigate the suppression issue there. *Glenn v. O’Meara*, No. 139429, 2012 N.Y. Misc. LEXIS 5832, at \*9 (Sup. Ct. Dec. 20, 2012) (unpublished decision) (“Where a criminal action is pending with respect to the same conduct underlying the parole revocation proceedings, suppression issues can be addressed in criminal court.”).

276. *Travis*, 734 N.Y.S.2d at 751.

277. Kit R. Roane, *Use of Police in Parole Raids Stirs Praise, but Also Concern*, N.Y. TIMES, Aug. 12, 1999, at A1.

278. *Id.*

279. William D. Burrell, *Getting the Most Out of Probation/Parole-Police Partnerships*, COMMUNITY CORRECTIONS REP., Nov./Dec. 1999, at 1, 2.

280. See, e.g., *People v. Mackie*, 430 N.Y.S.2d 733, 735 (App. Div. 1980) (finding that “[t]here was no satisfactory explanation for [the] presence” of police officers during a parole officer’s visit to a parolee’s apartment).

281. In the Second Circuit, it is irrelevant whether police officers are “using” parole officers’ broader search entitlements simply to gather criminal evidence. *United States v. Reyes*, 283 F.3d 446, 463 (2d Cir. 2002) (holding that when a probation officer enters a residence based upon information that the parolee is engaged in illegal activity, “it is difficult to imagine a situation where [he] . . . would not be pursuing legitimate supervised release objectives,” even if accompanied by the police). The same rule applies to state parole officers. *United States v. Newton*, 369 F.3d 659, 667 (2d Cir. 2004). Thus,

There is reason to believe that the lower standard will be applied in New York with some frequency because the NYPD and the New York Division of Parole participate in joint task forces to locate and arrest people who have absconded from parole.<sup>282</sup> Additionally, the Parole Division has a policy requiring their officers to be accompanied by at least two police officers for any home visit occurring after 10 p.m.<sup>283</sup> Police and parole agencies also contribute to and share a criminal justice database<sup>284</sup> and participate in joint ride-alongs.<sup>285</sup> More informally, case law references police and parole officer cooperation even in the absence of an official policy or partnership.<sup>286</sup>

Additionally, officers can use the threat of arrest to coerce parolees into acting as informants. Acting as a criminal informant is not only dangerous—it also places parolees in contact with criminals, thereby increasing their risk of reoffending.<sup>287</sup> Furthermore, being in proximity to known criminals can violate a condition of their parole. Yet, this double bind may be difficult for parolees to avoid.

In addition to enabling police and parole officer intrusions on parolees' privacy, these reduced rights against the state also make parolees vulnerable to victimization by private individuals, who can prey on their diminished legal status. For instance, a mugger with awareness that a parolee is out past curfew can easily rob him, knowing that the parolee is unlikely to report the incident to his parole officer or the police.<sup>288</sup> Additionally, gang members and other criminals can blackmail parolees into criminal activity by threatening to call their parole officer or the police with a tip, whether true or not, that the parolee is engaged in criminal activity or violating some other condition of parole.

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there is every incentive for the police to conduct searches with parole officers in order to avoid the probable cause, warrant, and reasonable suspicion requirements.

282. See, e.g., *People v. Van Buren*, 604 N.Y.S.2d 188, 189 (App. Div. 1993) (referencing NYPD officer assigned to the Warrant Division of the Parole Task Force); *People v. Fields*, 756 N.Y.S.2d 399, 401 n.1 (Sup. Ct. 2003) (referencing a joint task force between the NYPD and the New York Division of Parole).

283. *People v. Taylor*, 947 N.Y.S.2d 871, 872 (App. Div. 2012) (referencing this policy).

284. JANNETTA & LACHMAN, *supra* note 227, at 25.

285. Interview by David M. Allen with Mary Kopp, Parole Officer, N.Y. State Dep't of Corr. & Supervision (July 10, 2013).

286. *State v. Harder*, 799 N.Y.S.2d 353, 355 n.2 (Sup. Ct. 2005) (referencing police and parole officers conducting a joint operation).

287. JANNETTA & LACHMAN, *supra* note 227, at 27 (noting that while "[p]olice may want . . . parolees to aid their investigative work by acting as criminal informants," doing so "could require interacting with criminals and might ultimately put supervisees at risk for reoffending").

288. Goffman, *supra* note 117, at 345 (describing an incident in which a parolee feared going to the hospital after being severely beaten).

Studies have shown that even family and friends use parolee status as a form of leverage over the parolee. Sociologist Alice Goffman, who conducted a six-year study of a group of African American men in a Philadelphia neighborhood, found that friends and family would often use the threat of reporting real or false violations to parole officers as a means of coercion and social control.<sup>289</sup> In fact, one parole officer related that “the most common way he learned about rule violations was from offenders’ ‘girlfriends, ex-girlfriends, family, [or] friends.’”<sup>290</sup> This, of course, undermines the very social networks that are critical to rehabilitation.

The point of this discussion is not that members of the community should be discouraged from reporting parolees’ violations of conditions; rather, it is that the punitive nature of the parole system makes parolees so attuned to the threat of revocation that it can make them vulnerable to manipulation in ways that undermine their prospects for rehabilitation. Police and criminals alike can use parole violations, real or fictitious, as leverage to coerce parolees into acting as informants or engaging in criminal activities, since, once a parolee is arrested on a violation, he or she will remain in custody for at least fifteen and up to 105 days before a hearing officer will adjudicate the merits of the alleged violation.

Even if the parolee is eventually restored to supervision, any job or educational opportunities he or she had will likely have been lost while he or she languished in jail. We have illustrated this effect by examining New York, a state that does not even fully exploit the latitude given to it by the Supreme Court. “[T]he threat of imprisonment transforms social relations by undermining already tenuous attachments to family, work, and community[.]” and it allows people in the community to “exploit [parolees’] wanted status as an instrument of social control.”<sup>291</sup> In this way, parolees’ reduced rights breed even fewer rights. For all of these reasons, the current system of parole, which is meant to facilitate a parolee’s successful reentry into the community, has the perverse effect of achieving the opposite.

### 3. Targeting Parolees for Stops and Frisks

Police officers have more latitude to stop and frisk parolees than ordinary citizens because a parolee’s status is relevant to the reasonableness determination. This suggests that officers will subject

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289. *Id.* at 348–49.

290. Klingele, *supra* note 46, at 1037 n.111.

291. Goffman, *supra* note 117, at 339.

parolees to more aggressive policing tactics. Typically, officers' performance evaluations and promotions are tied to the number of arrests they make.<sup>292</sup> To the extent that rank and file officers want to move up the chain of command, this merit system provides them with incentives to focus stops and frisks in neighborhoods where they believe they will achieve the greatest number of arrests at the lowest cost.<sup>293</sup> This makes neighborhoods with high concentrations of parolees extremely attractive.

More permissive reasonableness standards governing police interactions with parolees make it easier to justify stops and frisks. For instance, parolees tend to live in high-crime neighborhoods, a factor officers often utilize to explain why they considered an individual's otherwise innocent behavior suspicious.<sup>294</sup> While courts have sometimes rejected this as the sole basis for stopping and frisking ordinary citizens, it may be sufficient to establish reasonable suspicion if parolees are the targets, given their diminished expectations of privacy.<sup>295</sup> This reasoning similarly applies to other criteria officers rely on to justify their stops and frisks, such as a suspect's association with known criminals. As such, not only might the threshold for searching parolees be lower than for ordinary citizens, but also establishing reasonableness is easier for the police when the frisk concerns parolees.

Parolees often live in neighborhoods with large concentrations of

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292. See, e.g., *The War on Marijuana in Black and White*, AM. CIV. LIBERTIES UNION 98–104 (June 2013), <http://www.aclu.org/files/assets/061413-mj-report-rfs-rel5.pdf> (noting the use of arrests as performance measures and incentives to obtain federal grants). This form of accountability is largely an outgrowth of Compstat, a program developed in New York that allows departments to gather crime statistics in order to “identify emerging problems[,] to coordinate effective deployment of resources [, and] to increase accountability.” *Compstat: Its Origins, Evolution, and Future in Law Enforcement Agencies*, BUREAU OF JUST. ASSISTANCE 4, 8 (2013), <https://www.bja.gov/Publications/PERF-Compstat.pdf>. As Wesley Skogan notes, Compstat “focuses on traditional measures” of performance, including the number of arrests made. Wesley G. Skogan, *Why Reforms Fail*, in *POLICE REFORM FROM THE BOTTOM UP: OFFICERS AND THEIR UNIONS AS AGENTS OF CHANGE* 144, 151 (Monique Marks & David Sklansky eds., 2012).

293. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 189–190 (1993) (“[O]bjectification and quantification of police work . . . trickles down to the department’s lowest level, its patrol cars and foot beats. When that occurs, everybody up and down the line becomes driven by the need to generate what New York cops used to call ‘big numbers.’”).

294. See *infra* Part IV.

295. See, e.g., *People v. De Bour*, 352 N.E.2d 562, 570 (N.Y. 1976) (holding that acts were sufficient to justify officers’ suspicions in part because it was late at night in a high-crime area); *People v. Howard*, 542 N.Y.S.2d 536, 540 (App. Div. 1989) (noting that the high-crime factor alone “cannot serve as the justification for untoward or excessive police behavior,” but that it can be considered “in combination with objective factors specific to the incident which together support a founded suspicion that some particular criminal activity may be afoot”); *People v. Cornelius*, 497 N.Y.S.2d 16, 19 (App. Div. 1986) (noting the high-crime nature of the area in determining that a stop and frisk was justified).

convicts and criminals,<sup>296</sup> making it even easier for officers to stop and frisk parolees. Because open-air drug markets and gang violence are often rampant in such neighborhoods, it is easy for a parolee to inadvertently be in the vicinity of a drug deal or violence. Thus, simply walking around their own neighborhood may give officers reason to stop parolees for questioning. Even if parolees make efforts to avoid criminals and other parolees in their midst, these efforts may themselves be used as evidence of suspicious activity justifying a stop: walking down deserted streets, looking around before entering a building, and remaining in a vehicle until ascertaining the coast is clear are all behaviors cited by NYPD officers as suspicious activity warranting a stop and frisk.<sup>297</sup>

Moreover, a standard condition of parole in New York and many other states prohibits parolees from associating with anyone who has a criminal record. Officers are likely aware of this condition as a result of working closely with parole officers. Hence, parolees are constantly at risk of violating or being accused of violating this condition of parole simply by virtue of where they live. Police can not only use this parole condition as a basis for stopping and questioning a parolee, but also they can threaten to make a phone call to the parole officer to report a suspected violation. This can then provide the basis for the issuance of a parole warrant.

Another factor that may result in parolees being stopped and frisked more often than ordinary citizens is that being a person with “dangerous propensities” can be sufficient to establish reasonable suspicion.<sup>298</sup> Officers have multiple ways of becoming aware of a parolee’s criminal history.<sup>299</sup> If officers know that a parolee was previously convicted of an assault or some other violent offense, this can support an inference that he or she poses a

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296. See *infra* Part IV, Maps A–D (showing the strong coincidence between parolee-dense neighborhoods and police stops).

297. *Howard*, 542 N.Y.S.2d at 536–40 (noting that officers approached individual for more investigation when, among other things, they observed the individual standing on a street corner near a subway entrance for two to three minutes, looking up and down the street and subway stairs); *Cornelius*, 497 N.Y.S.2d at 17–20 (noting that officers justified a stop in part because they saw the defendant walking, stopping, and looking around at 10 p.m. wearing a “ragged and old” trench coat); *People v. Williams*, 436 N.Y.S.2d 15, 17 (App. Div. 1981) (discussing an anticrime unit whose officers decided “to check their license and registration, things like that” after observing three men talking to each other in a vehicle for about fifteen minutes while looking at the front door of a building).

298. *People v. Chinchillo*, 509 N.Y.S.2d 153, 155 (App. Div. 1986) (discussing “dangerous propensities attributable to [defendant]” as part of reasonableness analysis).

299. In New York, police and parole agencies both contribute to and share a criminal justice database. JANNETTA & LACHMAN, *supra* note 227, at 25. See also *supra* note 282 and accompanying text (discussing joint task forces). Additionally, police officers can become aware of the parolee’s criminal history through the joint parole-police task forces and through their previous interactions with parolees.



danger to officer safety and should be frisked.

Officers may also use aggressive stops and frisks in areas with large numbers of parolees in order to drive them out of the neighborhood.<sup>300</sup> Parolees have little recourse against such activities. While they could in theory bring a civil rights damages action pursuant to § 1983 in Title 42 of the United States Code, these claims provide little hope for relief because of qualified immunity and a host of other problems.<sup>301</sup> Additionally, parolees who are harassed by the police have much to lose if they complain or report the misconduct because if they are arrested in retaliation, they can spend a considerable amount of time in custody before a final revocation hearing is held.

In sum, parolees make attractive targets for police officers motivated to bolster their arrest statistics. Since parolees have only limited rights against unreasonable searches and seizures, police may err on the side of conducting a frisk or search rather than forego the opportunity to find criminal evidence. Furthermore, as we showed in previous sections, a parolee's reduced procedural and substantive rights mean that officers can violate the few privacy protections parolees do possess with impunity. Even if police conduct an unlawful search or seizure, illegally seized evidence can be considered in determining whether the parolee violated any condition of parole. Thus, the myriad conditions to which parolees are subject, coupled with their reduced procedural and substantive rights, have the effect of decreasing their rights even further. The next part tests whether these effects occur systematically.

#### IV. AN EMPIRICAL STUDY OF THE IMPACT OF PAROLE ON THE INDIVIDUAL AND THE COMMUNITY: NEW YORK CITY POLICE STOPS, FRISKS, SEARCHES, AND ARRESTS

This part reports our empirical study of the relationship between living in a neighborhood with a high density of parolees and the frequency of both police stops and police action taken after stopping an individual—conducting frisks, searches, and arrests. We show that not only are individual parolees subject to significantly more stops, searches, and

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300. Kim, Gerber & Beto, *supra* note 232, at 631 (noting that “mission distortion” caused by partnerships can “make it easier for police to abuse their power and engage in behaviors such as harassing probationers in an attempt to drive them out of particular neighborhoods”).

301. For a general discussion of the barriers posed by § 1983 litigation, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 467 (2004) and Dasha Kabakova, Note, *The Lack of Accountability for the New York Police Department's Investigative Stops*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 551–55 (2012).

arrests, but so are nonparolees living in neighborhoods with high numbers of parolees. This hazard is not simply a product of being a high-crime area; if that were the case, we would see increases in all four categories of outcomes. The reduced rights of parolees created by *Samson* and other like rules enable police to search parolees with lower standards of suspicion; consequently, they can often undertake searches without first using frisks to establish probable cause for a search. Consistent with this, our results show that frisks are significantly decreased in parolee-dense neighborhoods, while stops, searches, and arrests are significantly increased.

#### A. ORIGINAL DATA DESCRIPTION

In order to analyze the effect of parole on both individual and community constitutional criminal rights, we created two new databases: one that examines the effect of parole on the probability of being stopped by the police, and another that examines the effect of parole on the probability, once stopped, of being frisked, searched, and arrested.

Both of our databases use New York City police statistics. New York City was recently found liable in the first of three class actions challenging the constitutionality of the nonrandom nature of police stops, frisks, searches, and arrests. The order was subsequently blocked, and the legal case was settled, with an agreement that a court-appointed monitor would oversee reform of the NYPD's stop and frisk program. Our analysis adds insight to that controversy. That litigation concerned racial profiling, but our analysis shows that, even controlling for race at both the individual and the community levels, police targeting of individuals for *Terry* stops is correlated with the density of the parolee population. Racial differences are only one mechanism by which police are selecting individuals for stops; parole is another such targeting factor. Consequently, our data confirms the suspicion raised by our preceding doctrinal analysis that parole jurisprudence has had a significant adverse effect on individual and community rights.

Our database concerning the probability of being frisked, searched, and arrested uses data from previous racial profiling studies and expands on it to include parolee density statistics. This database is rich in information, comprising over 678,000 observations of police stops of individuals in 2011. The Appendix provides a copy of the form the NYPD used to collate the data. The data has over 100 variables, including: the sex, race, and age of the individual stopped by the police; the location where the stop occurred; and information about the nature of the stop. The data includes the reason why a stop was initiated, the procedure followed during the stop

(such as whether force was used), and the outcome of the stop (such as what was found during a search). Consequently, we are able to consider and control for a large number of factors that could potentially affect the relationship between police stops and parolee density.

One limitation of this frisk, search, and arrest data is that it selects on the dependent variable—it shows only what happens when a stop occurs. As such, it is possible to examine the race, gender, and income of only those stopped. Thus, this data cannot answer the preliminary question of why any person is stopped in the first place, since it has no information on who is not stopped. However, our second database provides an opportunity to address this question. We have combined data about New York City police stops per zip code<sup>302</sup> and the number of parolees per zip code,<sup>303</sup> allowing us to analyze the relationship between the two. Thus, in combination, our two databases allow us to analyze who is stopped and what happens once they are stopped.

There were two practical complications in creating these databases—one geographic and one temporal. The raw parolee data was at the zip code level, whereas the raw stop data was at the individual level. Nonetheless, we were able to translate the data into comparable geographic units. The stop data contains X and Y coordinates under the State Plane Coordinate System, which is akin but not identical to the latitude and longitude coordinate system. Next, we converted the parolee data available at the zip code level into the State Plane System.<sup>304</sup> We then performed a Spatial Join to convert both sets of data into zip codes.<sup>305</sup> This allowed us to answer our preliminary question of who is stopped by comparing police stop data with parolee data.

The temporal complication was that the parolee data is the number of parolees living in a zip code as of December 15, 2008, whereas the police

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302. *Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Mar. 14, 2014).

303. *Data*, JUST. ATLAS SENT'G & CORRECTIONS, <http://www.justiceatlas.org> (last visited Mar. 14, 2014).

304. It was originally in a projected Coordinate System called NAD\_1983\_UTM\_Zone\_18N. We converted the projection of the zip codes into the State Plane coordinate system using the Projection tool in ArcGIS 10. We very gratefully acknowledge the invaluable aid of David Chan for his help in automating and executing this conversion process.

305. A Spatial Join uses a common key between the two sets of information to combine them; the “key” is based on a spatial location where the points fall within the zip code. To see an example, visit <http://i.imgur.com/t1f4fqu.jpg>. Basically, the spatial join pulls the information from the zip code outlines into each of the stop and frisk points. Again, thanks to David Chan for writing a program that automated this process, and thus making it practical to undertake for 600,000 observations.

stop, frisk, search, and arrest data is for the year 2011. There are a number of reasons to be reassured that our results are valid despite this time difference. First, empirically, as becomes apparent in the discussion of Figure 3 below, there is a high level of congregation of where parolees live, and so there is good reason to expect that the parolee data would not change drastically from year to year. Second, theoretically, it makes good sense to compare parolee data from at least a slightly earlier date than the stop data, since police officers' impressions of the demographic characteristics of a neighborhood would presumably be based on how that neighborhood was in the recent past, rather than how the neighborhood is at that precise moment. Even if parolee density data does change, police perceptions are likely to lag, so our results should be reliable despite the time shift. Finally, to the extent that there is more of a lag in our data than in the police targeting process, this complication should make finding any result more difficult, and so it does not undermine our results.

We first address the preliminary question of who is stopped, using what we call the "Stop Data." We then address the secondary question of what occurs after the stop is made, using what we call the "Frisk, Search, and Arrest Data."

#### 1. Descriptive Statistics: Stop Data

Table 1 provides a summary of our first database, the Stop Data. The first two variables, "parolees" and "stops," are the rates of parolees and the rates of stops for each zip code. We hypothesize that parolee density and stop frequency will be positively related—our theory is that police target high parolee neighborhoods for *Terry* stops.

It is apparent from the summary information that the incidence of both parolees and police stops varies considerably between zip codes—the standard deviation for each is greater than their respective means. For all of the variables, the minimum is zero. Perhaps unsurprisingly, some zip codes in the city have no resident parolees, and some have no incidence of police stops. The zip code with the highest density had 540 parolees, and the most targeted zip code had tens of thousands of stops. Clearly neither variable is distributed randomly.

TABLE 1. Stop Data

	<i>Mean</i>	<i>Standard Deviation</i>	<i>Median</i>	<i>Maximum</i>
Parolees	86.72	110.66	39.00	540.00
Stops	3,476.00	3,859.98	2,178.00	22,647.00
Parolee per capita	0.0018	0.0022	0.0012	0.0163
Stops per capita	0.0758	0.0723	0.0532	0.6205
Fraction non-white or Hispanic	0.63	0.30	0.61	1.00
Fraction household income <\$25,000	0.27	0.15	0.26	0.63
Fraction single- parent household	0.20	0.13	0.16	0.48
Number of zip codes: 188				

By dividing the data by population, we are able to analyze the relationship between the number of parolees per capita in a particular area and the number of police stops per capita in that area—our third and fourth variables. Thus, we have both the “parolee count” and the “parolee rate” in the zip codes of New York City. When we conduct our regressions, we provide one model using parolee counts and controlling for population, and another model normalizing by population (dividing each variable by the population of the zip code). Actual parolee and stop rates are easy to interpret, but parolee per capita and stops per capita are advantageous because they control for population variance more directly. As such, we use parolees per capita and stops per capita for most of our analysis, but we display our first set of results using both count and rate variables for ease of comprehension. The results are highly consistent, regardless of which method is used.

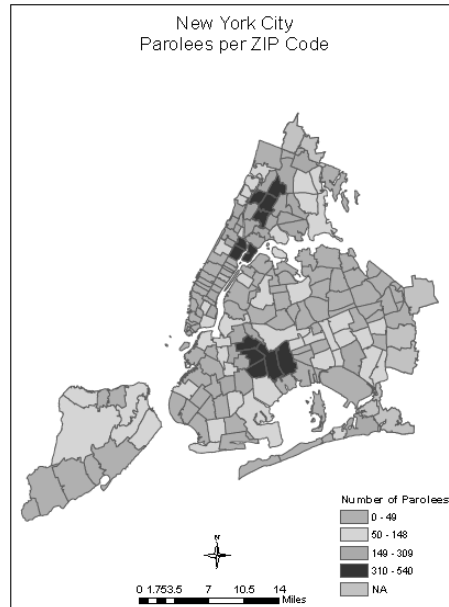
The summary statistics show that there is high variance in both parolees and stops, but is this variance random? To begin to address that question, we next map the geographic incidence of that variance. From this,

we see that not only is each variable distributed nonrandomly, but also there appears to be a strong relationship between the two.

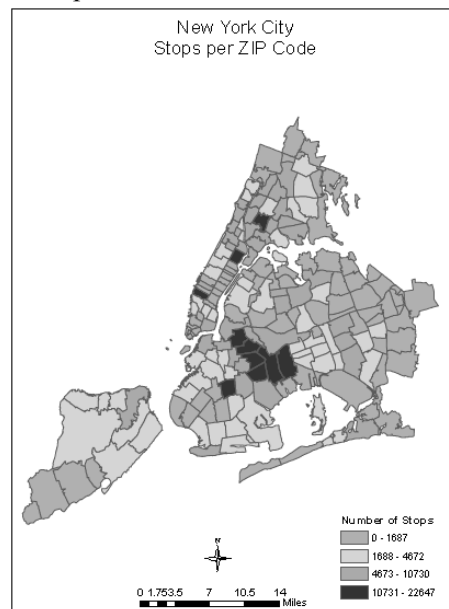
Figure 1 presents maps of the New York City population, first by density of parolees (Map A) and then by incidence of police stops (Map B). These two maps illustrate a strong coincidence between our two main variables of interest. Comparing them indicates that it is largely the same zip codes that have zero or close to zero parolee residents and those zip codes that have no or few stops. The same applies for medium and high-density rates of each variable. When we contrast this to the map of the general city population (Map C), it is clear there is also significant crossover between both stops and parolee density and population density generally: parolees tend to live in high-density neighborhoods and the police conduct most stops in high-density neighborhoods. However, the highest density of both parolees and stops occurs within a subset of the most densely populated parts of the city—and it is the same subset for both our variables of interest. Clearly then, controlling for population is important, but population does not fully explain which areas the police choose to target.

FIGURE 1. New York City Population Density Maps by Parolees and Stops

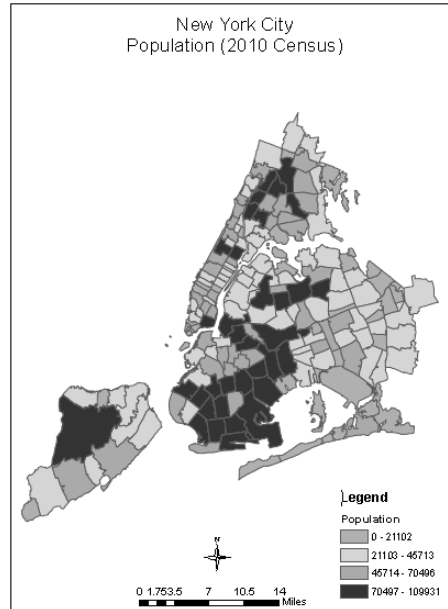
MAP A. Parolees



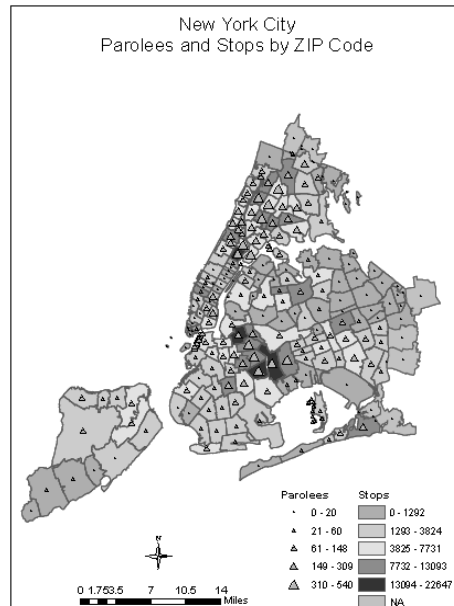
MAP B. Police Stops



MAP C. General Population



MAP D. Parolees and Police Stops





When the incidence of parolees and stops are overlaid (Map D), we gain a strong impression that our two variables co-vary significantly—there is manifestly some kind of relationship between the two. We see below in our formal regression analysis that this relationship is statistically significant, but it is also clear from visual inspection that the relationship is substantively significant. The largest triangles, which represent the densest population of parolees, are approximately twenty times greater than the lowest category; similarly, the darkest regions, which represent the highest frequency of police stops, are approximately ten times greater than the lowest category. The largest triangles only occur in the two darkest shaded regions of the city. These maps show actual rates of parolees and stops, but the relationship is not undermined when instead we normalize by population. The correlation between parolees per capita and stops per capita is a solid 0.54.<sup>306</sup> Clearly then, police are stopping individuals where parolees reside at far greater rates than individuals in parolee sparse districts.

Of course, that relationship could be illusory: both variables could be driven by some other factor(s). To determine which variables we should control and whether the correlation between parolees and stops is real or spurious, we need to think first about the mechanism by which police are likely to target parolees. In *Floyd v. City of New York*, the case on racial profiling by the NYPD, the claim was that police observe individuals of minority races and stop them because of their race, rather than because of any suspicious activity.<sup>307</sup> In some cases, parolee status may be similarly observed: individual parolees will be known to individual police officers. As discussed, parole officers and the NYPD participate in joint ride-alongs and share a criminal database. Police officers may also have been involved in the parolee's arrest, or officers, walking their beat, may have had prior contact with the individuals after their release on parole. In other cases, the officer may be considering parolee status probabilistically: the officer knows that the neighborhood has a high rate of parolee residences, either because the officer knows the neighborhood well, or because of publicly available cues, such as the presence of halfway houses. Knowing a neighborhood has a high rate of parolees, an officer conducting a stop is

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306. The correlation coefficient measures the strength of the linear relationship between two variables. It ranges between -1 (a perfect negative relationship) through 0 (no relationship) to 1 (a perfect positive relationship). The square of the coefficient is generally interpreted as the percentage of variation in one variable that can be explained by the other. A correlation between 0.5 and 1 is generally considered to be a moderately strong relationship. DAVID M. LANE, ET AL., INTRODUCTION TO STATISTICS 170 (1993).

307. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

likely to ask an individual, “Are you on parole?” since, as discussed earlier, a positive answer lowers the threshold for a search of the individual. Effective screening is likely both because parolees face serious consequences for lying to the police about their status and because police on the street now typically carry handheld devices through which they can quickly check an individual’s parole status.

Similarly, most police are also likely to know which areas are largely made up of low-income households and to use income as a screening device for suspicion. Income is often roughly visually apparent at the individual level based on clothing, hair, idle presence on the street during business hours, and the like. Furthermore, police are likely to target high-crime areas, which strongly tend to be low-income areas. At the same time, parolees can be expected to live in low-income neighborhoods. As such, low income could conceivably explain the apparent relationship between parolees and stops. In fact, low income is correlated with police stops at 0.46, and with parolees at 0.54. These are solid relationships that imply it is important to control for income in our regression analysis.

The difference is that while low income might be a proxy for suspicion in the eyes of many police officers, it does not translate to greater powers of searching with a lower threshold, as does parolee status. Parolee frequency serves a threefold advantage: as a proxy for crime (given high recidivism rates), as a means of leverage (as discussed in Part III.B), and as a means of lowering the threshold for further intrusion on Fourth Amendment rights. As such, we recognize the need to control for other screening mechanisms such as low income, but we do not expect it to capture, or even be as informative as, the effects of parolee density, simply because of the incentives for police to focus on parolee status.

There are other variables that could play a similar role. The fraction of non-white or Hispanic residents in the neighborhood is correlated at 0.46 with stops and 0.62 with parolees. Single-parent households correlate with stops at 0.53 and with parolees at 0.68. As such, it is important to control for all of these variables in our statistical analyses. A final factor that we might expect could also constitute an omitted variable is the crime rate, but we do not control for this factor. Doing so could create a reverse causation problem. Significantly more stops are likely to occur in high-crime neighborhoods, but stops—and the subsequent arrests—constitute one of the primary means by which crime rates themselves are determined. As such, we cannot include crime rate as a control, but between our control variables of income, race, and single-parent household, we are likely to have captured much of the screening effect of high crime rates.

Furthermore, we are able to control for crime rates in other ways when we look at the individual data.

To examine the relationship between parolee density and stops, we first graphically represent the correlation between them, as well as the relationship between each and the incidence of low-income residents. Figure 2A represents the association between parolee density and police stop frequency, in nominal rates. Figure 2B represents the same relationship normalized by population. The two scatter plots are of each zip code, with the density of parolees and parolees per capita, respectively, displayed on the X axes, and stops and stops per capita displayed on the Y axes. The diagonal lines are the lines that best fit each zip code's parolee-stop relationship.

FIGURE 2. Police Stops by Parolees and Parolees Per Capita

FIGURE 2A. Police Stops by Parolees

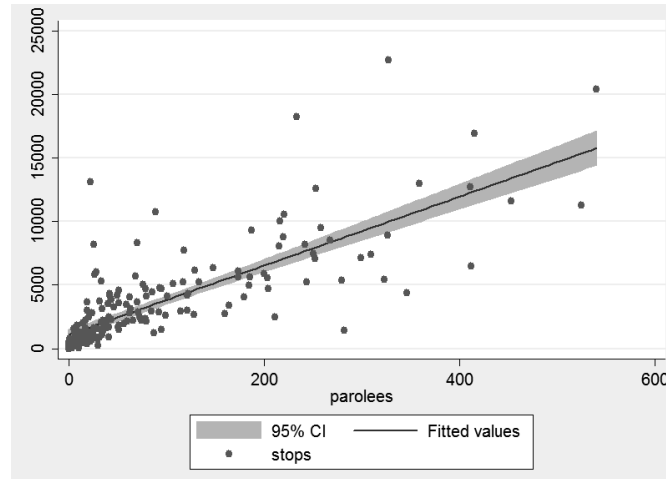
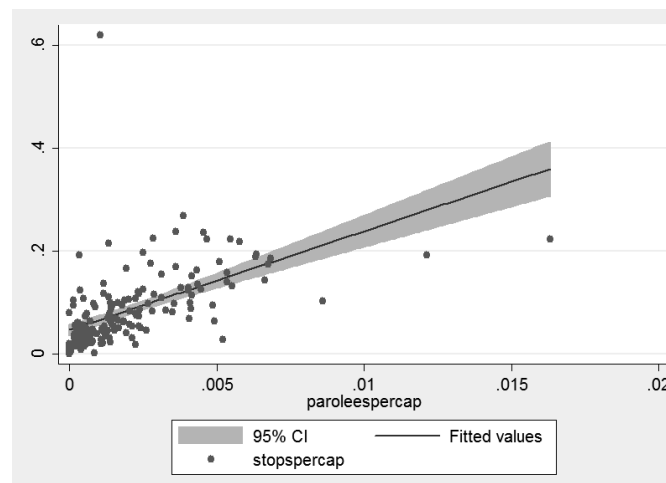


FIGURE 2B. Police Stops by Parolees Per Capita



There is a manifest positive relationship between our two variables of interest, and this relationship becomes even clearer when population is considered. Most zip codes cluster around the low parolee-stop region (lower left corner), and stops become significantly more frequent as parolee density increases (upper right corner).

The gray shaded regions are the 95% confidence intervals of the fitted value lines for each figure. The confidence interval is a measure of uncertainty: we can say with 95% confidence that the true relationship between the two variables is a line within the shaded area. Here, the confidence range is narrow around the high gradient of the line, showing there is significant difference between zip codes and that substantial increases in parolees are correlated with substantial increases in stops, with less than a 5% chance of random variation explaining the apparent relationship between the two variables.

#### B. REGRESSION RESULTS: STOP DATA

Our various descriptive statistics have provided a strong impressionistic account of the relationship between parolee density and police stops. To better discern that relationship while controlling for other factors, we now conduct Ordinary Least Squares regression analysis ("OLS"), including these control variables. Table 2 shows the results.

TABLE 2. Stops Per Capita &amp; Stops as a Product of Parolee Density, and Control Variables

<i>Variables</i>	<i>Stops Per Capita</i>	<i>Stops</i>
Parolee per capita	<b>10.78<sup>**</sup></b> (2.80)	...
Parolee	...	<b>17.64<sup>**</sup></b> (2.94)
Income below \$25,000	0.04 (0.06)	995.22 (2325.25)
Non-white / Hispanic	0.01 (0.03)	777.14 (1037.85)
Single-parent household	0.11 (0.08)	2771.30 (3844.00)
Population	...	<b>0.04</b> (0.01)
Intercept <sup>308</sup>	0.02 (0.01)	-999.42 (516.37)
Number of ZIP Codes	176	179
Adjusted $R^2$	0.33	0.67

\* =  $p < 0.05$ ; \*\* =  $p < 0.01$ <sup>309</sup>

308. This captures the point where the regression line crosses the y-axis, when all our independent variables are set to zero—that is, how many stops are predicted to occur when there are no parolees, no single-parent households, etc. in the neighborhood. The number of stops predicted under those circumstances is not differentiable from zero.

309. The p-value is the measure of how likely the data is to have occurred by chance if the null hypothesis is true. The lower the p-value, the more certain we can be that the effect is nonrandom. A p-value of 0.05 is the standard measure for statistical significance; a p-value of 0.01 is the standard measure of being highly statistically significant. They translate to a 95% and a 99% confidence of a genuine effect having occurred, respectively. DAVID M. LANE, ET AL., *supra* note 306, at 376 (explaining statistical significance and significance testing).

The first column of Table 2 shows per capita parolee rates regressed on per capita stops, with the standard deviation below in parentheses. The second column shows nominal parolee density rates regressed on nominal police stops, with population as a control variable. For both models, we control for income, race, and single-parent household status. Here, our race variable shows the fraction of non-white or Hispanic residents in the zip code. In the individual Frisk, Search, and Arrest Data, below, we use both this community race variable and an individualized race variable.

As predicted, the parolee coefficients in both models are positive and highly statistically significant. The p-values of 0.00 for each of the parolee coefficients mean that we have a 99% confidence level that there is a relationship between parolee residency and police stops. This provides strong support for our hypothesis that the density of parolees residing in a neighborhood also significantly increases the frequency of police stops.<sup>310</sup> All of our control variables—frequency of low income, minority race, and single-parent households—are also positive, as expected. However, none of the controls except population reach statistical significance—not even race. We discuss the significance of our race nonresults in the next section.

The parolee-per-capita coefficient of 10.78 means that increasing parolees per capita by 1 increases stops per capita more than tenfold. For example, increasing parolees per capita by 0.001 per capita would increase stops per capita by 0.011. Similarly, the parolee-rate coefficient of 17.64 means that an increase in a given zip code by one parolee increases the average number of stops by almost 18. These are large changes—remember that we are not measuring the number of stops of parolees, but the number of stops of *all people* in the overall zip code, subject to the variation of parolees residing in the neighborhood. Given that even in the most dense parolee neighborhood, the vast majority of people are not parolees, this is a massive effect. So as well as being statistically significant, our results have

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310. Parolee rates also maintain statistical significance in other models not reported here. The only model in which parolees per capita fractionally loses statistical significance is when all the control variables are included and unemployment is also included. Unemployment has a high correlation with single-family status, to the point where it effectively double counts in the regression. In fact, the adjusted R-squared actually decreases when unemployment is included. We consider that single-family status is more relevant for our inquiry than unemployment, given that income is already controlled. This is particularly true given that the unemployment rate does not count those who have dropped out of the labor force. BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—MARCH 2014, at 2 (2014), <http://www.bls.gov/news.release/pdf/empst.pdf>. Even including unemployment, parolee density nevertheless remains significant when not normalized by population. Additional analysis available from the authors.

considerable substantive significance.

We can consider the overall effect of the difference between a medium-density parolee neighborhood and a high-density parolee neighborhood on the predicted rate of stops. We do this by looking at how many stops occur when all variables are set at the median and how many stops occur when parolees are set at some other level. Looking at parolees per capita and stops per capita, an increase of one standard deviation<sup>311</sup> in parolees per capita translates to about a 24% increase in stops per capita. That is, almost one-quarter of the variation between neighborhoods is explained by an increase of one standard deviation in parolees per capita. Similarly, an increase in the parolee rate from the median value, 39, by one standard deviation to 111, translates to stops per capita increasing from 2374 stops to 3638, an increase of about 53%.

Given the high divergence between neighborhoods, in terms of both stops and parolee rates, and given that the vast majority of both occur in only a handful of zip codes, it is also worth comparing the top and bottom tenth percentile zip codes. All other things being equal, the bottom decile zip code has only approximately one parolee; the ninetieth percentile has 252. The difference in the expected number of stops is 1704 versus 6131. Moving from the lowest parolee-dense bracket of neighborhoods to the highest translates to a 260% increase in the number of stops. The same movement when measured in parolees per capita results in an 88% increase.

In terms of overall explanatory power, our stop models do very well. Once our key variable of interest, parolee density, is included along with the control variables, the R-squared of both regression models is high. The variation in police stops when considering the control variables plus either parolee per capita or parolee rates, respectively, is 33% and 67%. This means that our parolee independent variable and the control variables have explained a large proportion of police choice in stopping individuals.

The fact that we are showing a double-digit increase in the number of overall stops in a zip code, not the stops of parolees alone, shows strong support for the argument that both individual parolees and the community generally are being dramatically affected by the permissive police parolee stop and search jurisprudence. Given that parolees form a very small percentage of the population even in high-density neighborhoods, if there

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311. When data is distributed normally, one standard deviation in either direction from the median accounts for 34.1% of the distribution.



was not an effect on the community, in order to explain these numbers, parolees would have to be being stopped at well beyond the 10- or 18-fold increase indicated by the coefficients, but closer to thousands of stops in a year—or multiple stops per parolee per day. Far more plausible is the conclusion that police are targeting high parolee neighborhoods but regularly stopping nonparolees. Thus the lowered rights of parolees have the effect of diminishing the rights of their neighbors, an effect the *Samson* court never endorsed.

### C. INDIVIDUAL FRISK, SEARCH AND ARREST: DESCRIPTIVE DATA

We now turn to the question of what happens after the police have stopped an individual—do they frisk, search, and/or arrest the individual? Our individual Frisk, Search, and Arrest Data comprises over 678,000 observations, where each observation is an instance of a police officer stopping a person in New York City in 2011, rather than stops at the zip code level. It also contains demographic detail about every individual who was stopped.

The difficulty for the second prong of our investigation—whether, once stopped, parole status affects whether a secondary *Terry* outcome occurs—is that we do not know the parolee status of the individual stopped, only the parolee density of the zip code. We hypothesize that there is a link not only between whether an individual is a parolee and whether the individual will be stopped, but also with whether he or she will then be frisked, searched, and/or arrested. But for us to find such effects, given that the data is aggregated and nonspecified for parole status, police would have to be targeting parolees consistently enough for the effect to show at the aggregate level. Thus, this difficulty is in some ways a strength: if we can find support for our hypotheses that parolees are subjected to more searches and arrests based on this aggregate data, then the effect of police targeting of parolees must be strong indeed.

Table 3 provides the descriptive information about our second database. Table 3A details the breakdown of our dependent variables, the *Terry* actions taken following a stop (whether the individual was frisked, searched, and/or arrested), and the central control variable of race. Column 1 provides the racial breakdown of those stopped and Column 2 provides the racial breakdown of the general population of New York City. Note that the latter data was gathered from a different source, uses slightly different categorizations, and is for 2010 rather than 2011. Nonetheless, it provides a mechanism for rough comparisons. Table 3B lists the breakdown of the *Terry* factors specified by the police as reasons justifying each stop.

Two variables listed at the bottom of Table 3B are factors in whether the police chose to frisk the individual, rather than reasons to stop the individual. The first is furtive movements, a variable that can be a factor in a suspect being stopped or frisked. Furtive movements were a sign of suspicion used to justify the majority of stops, and also the majority of frisks.<sup>312</sup> The second factor is knowledge of the suspect's prior criminal behavior, which is one indication that, at least in some cases, police have knowledge of individuals' criminal history, as we discuss further below. This factor is the closest we have to the parolee status of the individual stopped, although obviously it does not distinguish between convicts and parolees. We expect this to have a positive relationship with searches and arrests. We discuss each of these variables in greater detail below. Remember that the percentages listed are of those already stopped.

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312. Furtive movements are pointed to in order to justify the frisk in 70.84% of frisks, but this is only 39.77% of all observations, since frisks occur in approximately half of stops.

TABLE 3A. Frisk, Search, and Arrest Data (*Terry* Outcome and Race)

	<i>Percentage of stopped individuals, 2011</i>		<i>Percentage of New York City population, 2010<sup>313</sup></i>
<b><i>Terry</i> Action</b>			
Frisk	56.14		
Search	8.44		
Arrest	5.91		
<b>Race</b>			
Black	50.59	Black/African American Non- Hispanic	22.8 <sup>314</sup>
Black Hispanic	7.00	Hispanic Origin	28.6
White Hispanic	26.40		
Asian	3.43	Asian Non- Hispanic	12.6
White Non- Hispanic	8.90	White Non- Hispanic	33.3
Other	3.85	Other	2.7
Number of stops: 678,092			

313. *Results from the 2010 Census: Population Growth and Race/Hispanic Composition*, CITY OF N.Y. 14 (2011), <http://www.nyc.gov/html/dcp/pdf/census/census2010/pgrhc.pdf>.

314. The United States Census Bureau estimates African Americans as 25.5% of the population, but that seems to include "Black Hispanics." *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Apr. 8, 2014).

TABLE 3B. Frisk, Search, and Arrest Data (*Terry* Factors)

<i>Terry Factors</i>	<i>Percentage of stopped individuals, 2011</i>
Area has high crime incidence	58.75
Furtive movements (stop)	51.85
Casing a victim or location	32.07
Proximity to scene of offense	21.09
Suspect acting as a lookout	17.96
Fits a relevant description	15.68
Ongoing investigation	14.27
Report by victim / witness / officer	11.29
Actions of engaging in a violent crime	10.32
Suspicious bulge	7.98
Actions indicative of a drug transaction	7.26
Wearing clothes commonly used in a crime	4.54
Associating with known criminals	4.12
Carrying suspicious object	2.36
Other	16.33
<i>Frisk Factors</i>	<i>Percentage of individuals frisked, 2011</i>
Furtive movements (frisk)	70.84
Knowledge of suspect's prior criminal behavior (frisk)	1.57
Total	166.35

The first set of variables described is the *Terry* actions taken by the police. The rates of arrests and searches are considerably lower than the rate of frisks—more than half of those stopped are frisked, compared to single digit percentages for searches and arrests. This is not surprising since to conduct a frisk the police ordinarily need only have reasonable articulable suspicion that the individual may be carrying a concealed weapon that could pose a danger to the officers,<sup>315</sup> whereas conducting an arrest or an actual search requires probable cause, a more rigorous standard.<sup>316</sup> But as described, the jurisprudence surrounding the rights of parolees permits both thresholds to be effectively lowered in numerous ways.

Previously, we hypothesized that parolee density would be positively correlated with police stops, which our results from the first database supported. Here we similarly expect that searches and arrests will be positively correlated with parolee density. We expect that as well as targeting parolees for stops, having stopped a parolee, police will have the power and incentive to search parolees at higher rates than others who have been stopped. And given that searches form the primary basis for arrest stemming from *Terry* stops, the rate of arrests should also be higher for parolees.

In addition to the direct effect on parolees, the leverage effects we described in Part III.B should also spill over to the families and cotenants of parolees, and even the wider community. By targeting parolee-dense neighborhoods, police will conduct more stops against nonparolees in those zip codes, giving them more of an opportunity to develop probable cause against nonparolees, even those who are unrelated to parolees. Consequently, we expect to see an increase in searches and arrests in parolee-dense neighborhoods, even when looking at aggregate numbers of stops.

Our expectation for the relationship between parolee density and frisks is more complex. For the reasons just summarized, New York police effectively face a lower threshold for searching parolees than nonparolees,

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315. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”). The fact that nonetheless the majority of people stopped are frisked arguably illustrates the lax nature of the reasonable suspicion standard under *Terry*.

316. Courts require that “facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed.” *Draper v. United States*, 358 U.S. 307, 322 (1959) (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878)).

given that parolee status allows otherwise unsuspicious factors to be considered suspicious, and even evidence that violates the standard will not be suppressed at parole hearings. This gives less incentive to police to conduct a frisk instead of a full search when they have stopped a parolee. Thus, while we expect a positive relationship between parolee status and searches and arrests, we could see a negative relationship between frisks and parolee status. However, if this frisk-skipping effect exists, it only applies to parolees; it does not share the spillover effect described for searches and arrests. As such, even if police are skipping frisks for all parolees who are stopped, it may be hard to show this effect, since our data captures stops of all individuals without differentiating between parolees and nonparolees, factoring only the relative density of neighborhoods by parolee rates.

It may seem likely that if police target parolees, they may also target convicts generally. Given recidivism rates, convict status might serve as a proxy for suspicion for many police officers. However, as with our discussion of low income, we argue that parole status is special because it not only may serve as a proxy for suspicion, but also it allows police to search with a lower threshold of cause. Those who have served time in prison but have completed their parole period are not subject to the more permissive search rules we have detailed. The difference between the single advantage of targeting convicts—as a proxy for crime—and the triple advantage of targeting parolees—as a proxy for crime, as a means of leverage, and as a means of lowering the threshold for closer investigation without regard for normal Fourth Amendment rights—allows us to differentiate between targeting of parolees versus convicts. If police are just targeting high convict areas, we should observe an increase in all three *Terry* outcomes; if they are targeting parolees in particular, we should see that heightened parolee density leads to an increase in searches and arrests but a decrease in frisks, given the fact of a stop.

The second set of variables in Table 3 is the individual race variables. As before in our Stop Data, we again control for the racial makeup of the zip code that the individuals are stopped in, but here we also control for the race of each individual stopped by the police. The numbers in Table 3 provide the *prima facie* case in the challenge to police practices in the *Floyd* case. According to the records of the police themselves, the majority of people stopped by the police are black (even excluding black Hispanics), whereas less than one quarter of the general population is black. In

contrast, less than 10% of those stopped are non-Hispanic whites.<sup>317</sup> The city's defense to the implication of racial discrimination was that minorities commit more crimes. However, the judge in *Floyd* rejected this argument, since "[t]here is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area."<sup>318</sup>

The third set of variables in Table 3 is the *Terry* factors—the conditions that gave rise to the reasonable, articulable suspicion that justified the initial stop. Since we are now looking at individual observations rather than at the zip code level, it is safe to incorporate the crime rate. As Table 3 shows, the most common *Terry* factor is that the individual was in a high-crime neighborhood. The second most common *Terry* factor was that the individual was displaying furtive movements. Displaying furtive movements is a highly subjective characterization, one that is difficult for anyone to challenge, and so it gives police enormous discretion in articulating reasonable suspicion. Both high-crime neighborhood and furtive movements were pointed to in over half of the stops made, yet the correlation between them is only 0.05. This indicates that almost every *Terry* stop in our data was justified either by occurring in a high-crime neighborhood or by an individual's furtive movements. The total percentage of *Terry* factors listed is 166.35%—this implies that for the average stop, 1.66 *Terry* factors were detailed. Thus, police either choose to target individuals in a high-crime neighborhood or they subjectively characterize an individual's movements as furtive, then they typically only point to at most one other suspicion-generating factor to have effective discretion over the determination of reasonable articulable suspicion in the vast majority of stops.

#### D. REGRESSION RESULTS: INDIVIDUAL FRISK, SEARCH, AND ARREST DATA

Table 4 shows the results of our regressions for the Frisk, Search, and Arrest Data. Table 4 contains three separate regressions, one for each *Terry* outcome—frisk, search and arrest. We report the OLS regressions, since they are the most intuitively comprehensible. However, since now our three dependent (outcome) variables are binary—each *Terry* outcome of frisk,

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317. For the details of the claim of police racial targeting, see generally Jeffrey Fagan, *Second Supplemental Report*, CTR. CONST. RTS. 11 (2012), <http://www.ccrjustice.org/files/FaganSecondSupplementalReport.pdf>. Fagan's expert report was considered as evidence in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

318. *Floyd*, 959 F. Supp. 2d at 560.

search and/or arrest either occurs or does not occur—we also conduct the analysis using both logit and probit. These methods use the probability of the dependent variable occurring as the outcome. For instance, instead of an either-or outcome for whether a search occurred, logit and probit regressions determine the probability of a search occurring, contingent on the independent variables of interest, such as parole status.<sup>319</sup> All of the results using either logit or probit are consistent with the OLS results reported in Table 4.<sup>320</sup> We display a more meaningful interpretation of the results of the logit regressions in Figure 3 below.

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319. Logit and probit are both designed for estimation of nonlinear effects, in particular for determining the effect of binary outcomes. Whereas OLS estimates the marginal, linear effect of each additional unit of the X variable on the Y variable (for example, how many additional stops are associated with each additional parolee living in the neighborhood), logit and probit estimate the contrasting probability of Y occurring or not occurring, subject to variation in X (for example, how likely an individual is to be frisked, arrested or searched, or for none of these events to occur, depending on parolee density in the neighborhood). See generally Forrest D. Nelson, *Logit, Probit and Torgit*, in *ECONOMETRICS: THE NEW PALGRAVE* 136 (John Eatwell et al. eds., 1990). The difference between logit and probit arises from the assumptions made about the distribution of the error term. Whereas logit assumes a logistic distribution, probit assumes a normal distribution. VANI K. BOROOAH, *LOGIT AND PROBIT: ORDERED AND MULTINOMIAL MODELS* 9 (2001).

320. These coefficients do not have an intuitive meaning without being converted into either odds ratios or probabilities. The reason for this is that a logit coefficient represents a movement along a nonlinear scale; consequently the effect of a 1 unit change in the independent variable will depend on the point at which that change begins. Lee Epstein, Andrew D. Martin, & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies*, 59 VAND. L. REV. 1811, 1813 (2006). Logit and probit regressions cannot be interpreted directly beyond whether the coefficients are positive or negative, and whether they are statistically significant. All of the logit and probit regressions of our data follow the same patterns reported in our OLS data, both as to whether the coefficients are positive or negative, and the level of statistical significance. The only exceptions are that single-parent status is a significant factor in arrests at the 0.01 level using both logit and probit; white individual is not significant for arrests when using logit but is significant when using probit; and income under \$25,000 is significant when parolee rates are used to predict arrests, but not when parolees per capita are used, under logit and probit regressions. Overall, our OLS regressions are more conservative than either the logit or probit regressions, so we report the OLS results.



TABLE 4. Frisk, Search, and Arrest as a Product of Parolee Per Capita, and Control Variables

	<i>Frisk</i>	<i>Search</i>	<i>Arrest</i>
<b>Community traits</b>			
Parolee per capita	<b>-2.96**</b> (0.52)	<b>3.73*</b> (0.29)*	<b>5.87*</b> (0.00)*
Non-white / Hispanic	0.18** (0.00)	0.01* (0.00)*	-0.00 (0.00)
Income below \$25,000	0.30** (0.01)	0.03* (0.00)*	-0.00 (0.00)
Single-parent households	-0.20** (0.01)	0.12* (0.01)*	-0.10 (0.01)
<b>Individual traits / Terry factors</b>			
White individual	-0.08** (0.00)	0.00* (0.00)*	0.00* (0.00)*
Proximity to scene of offense	0.02** (0.00)	0.02* (0.00)*	0.01* (0.00)*
Associating with known criminals	0.10** (0.00)	0.01* (0.00)*	0.01* (0.00)*
Area has high crime incidence	0.02* (0.00)	-0.01* (0.00)*	0.02* (0.00)*
Report by victim / witness / officer	0.04** (0.00)	0.01* (0.00)*	0.09* (0.00)*
Ongoing investigation	0.07** (0.00)	0.01* (0.00)*	0.00* (0.00)*
Prior knowledge of criminal history	... (0.00)	0.06* (0.00)*	0.03* (0.00)*
Intercept	0.37** (0.00)	0.08* (0.00)*	0.07* (0.00)*
Number of stops: 652,377	Adjusted $R^2$ : 0.02	Adjusted $R^2$ : 0.01	Adjusted $R^2$ : 0.02

\* =  $p < 0.05$ ; \*\* =  $p < 0.01$

Most significantly, our parolee per capita variable is again in the direction hypothesized and highly statistically significant for each of our three regressions. The results are unchanged when using parole rates.<sup>321</sup>

Frisks are negatively associated with being in a parolee-dense area, whereas searches and arrests are positively associated with being in a parolee-dense area. This supports our theory that (1) not only do police target parolee-rich areas for increased stops, but also they utilize permissive rules that enable them to search parolees more easily, skipping the intermediary step of frisking; that (2) they subject parolees to significantly more searches; and that (3) consequently more arrests are made of parolees. This also suggests that police are not simply targeting convicts, but are specifically targeting parolees; otherwise, if police were targeting convicts generally, we would see positive coefficients on all three *Terry* outcome variables.

However, the substantive significance of these results varies considerably for the three different inquiries. The coefficients reported describe the average effect for each outcome. The frisk, search, and arrest terms of -2.96, 3.73, and 5.87, respectively, mean that on average, an increase in the parolee per capita population by one percentage point would decrease the per capita risk of being frisked by 2.96%, increase the per capita chance of being searched by 3.73%, and increase the per capita chance of being arrested by 5.87%. But the relative size of the three coefficients somewhat understates the differing effect for each variable, as illustrated when we once again compare the effect of an increase of one standard deviation from the median for each regression. While a change of one standard deviation in parolees per capita almost doubles the number of parolees in a zip code (an approximately 80% increase), the associated decrease in the probability of being frisked is 1.1%, which is relatively slight. As such, the effect for frisks, although statistically significant, is quite small. For searches, the same increase in parolees per capita increases the predicted probability of being searched by 12.9%, a considerably more substantively significant increase that is more than ten times the negative effect for frisks. For arrests, the effect is greater still. An 80% increase in parolees per capita is associated with a 35.6% increase in arrests following a stop, an effect that is 30-fold larger than for frisks and a threefold larger than for searches.

When we again compare the top and bottom deciles, a shift from the bottom to the top parolee per capita decile results in the predicted rate of

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321. Results available from the authors.

stops increasing by about 87%; the predicted rate of frisks decreasing by only 2.8%; the predicted rate of searches increasing by a moderate 37%; and the predicted rate of arrests increasing a substantial 141%.

Consequently, we can have confidence statistically that each hypothesized parole effect on *Terry* outcomes occurs, but the negative effect for frisks is substantially less distinct than the positive effect of parolee density on searches and the overwhelmingly positive effect on arrests. The most obvious reason is that, once stopped, an individual is more likely than not to be frisked, regardless of parolee status, whereas searches and arrests occur far more selectively, and so parolee status seems to have more of an impact on whether the police search or arrest.<sup>322</sup> Furthermore, remember that we are examining the effect of parolee jurisprudence on not only parolees who are stopped, but also on nonparolees who are stopped. Only for parolees can the police expect to need less suspicion for a search than probable cause to be able to use anything found to develop probable cause for an arrest. As anticipated, we observe a much bigger impact in the search and arrest statistics than in frisk statistics. We believe this is because the pool of parolees in the population of individuals who are searched and arrested is far more concentrated, since the police are targeting parolees at higher rates than nonparolees. The frisk effect we describe may be real, but identifying it is difficult: the numbers are diluted by frisks of nonparolees, since ultimately frisking stopped individuals is the norm.

In fact, the relationship between parolee density and *Terry* outcomes must be quite high for our results to appear at all, since our data covers *all* frisks, searches, and arrests, as discussed in our hypotheses section. It is for this reason that we see a very low R-squared. This effect is normal in individual studies of this kind. We do not have high predictive levels since most people *will not* be searched or arrested, even those who are stopped.

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322. The classification that the police use makes no apparent distinction between pre- and post-arrest searches. Thus, it is unclear how many of the searches are searches incident to arrest. The correlation between arrests and searches is slightly less than one half (0.4956), so they are clearly not perfectly correlated. In terms of conditional probabilities, if an individual is searched, the odds that he or she was frisked are extremely high (95.7%), but the odds of being frisked even when not searched are still better than even (52.5%). In contrast, people are seldom searched without being frisked (0.03% of all cases), whereas almost half the people are frisked but never searched (48% of stops). Once frisked, the conditional probability of being searched is 14.3%, and the odds of being searched when not frisked are 0.8%. That 0.8% can arise in two possible scenarios: when the police have probable cause early in the encounter such that they are likely to search immediately without bothering with the frisk, or with parolees, for whom they require only reasonable suspicion to search rather than probable cause. With parolees constituting only 0.02% of the overall population, they may well be routinely prophylactically searched and thus make up a large portion of those who are searched but not frisked.

Put another way, there is a lot of noise inherent in our data. As such, our theory is greatly buoyed by the fact that we are able to find an effect, even though we are looking at aggregated data for all stops rather than stops of parolees only.

These results assume that the effects must all be linear. Next we use logit to check whether the results are robust when that assumption is relaxed. A good way to predict and interpret probabilities from a logit (or probit) model is to create a simulation of the parameters based on the regression and run that simulation again and again. Generally 1000 times is adequate.<sup>323</sup> Our logit regression involves multiple factors that vary simultaneously, so to graph the relationship between just two of those variables (the predicted probabilities of our *Terry* outcomes as against parolees per capita), we have to choose a setting for each of the control variables. Households earning under \$25,000 and single-parent households are both continuous variables, so we set them to their means. All the other control variables are dichotomous, and most occur rarely, so we set them to zero, with two exceptions: first, as mentioned, the majority of stops occur in high-crime neighborhoods, so we set that variable to one; second, since race is generally considered to be of particular significance in stops, we conduct our analysis for both stops of minorities and stops of whites. We then use a program that draws 1000 sets of simulated parameters for each variable, creating a new set of variables for each coefficient<sup>324</sup> that we graph in Figure 3.

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323. See Michael Tomz et al., *Clarify: Software for Interpreting and Presenting Statistical Results*, J. STAT. SOFTWARE, Jan. 2003, at 1, 3, 6, available at <http://www.jstatsoft.org/v08/i01/paper> (prescribing a Monte Carlo method of stochastic simulation for each parameter, with 1000 draws from the distribution usually being sufficient).

324. *Id.* at 5 (“Clarify uses stochastic simulation techniques to help researchers interpret and present their statistical results. It uses whatever statistical model you have chosen and, as such, changes no statistical assumptions. As a first step, the program draws simulations of the main and ancillary parameters from . . . their asymptomatic sampling distribution, in most cases a multivariate normal with mean equal to the vector of parameter estimates . . . and variance equal to the variance-covariance matrix of estimates . . .”).

FIGURE 3. Changes in the Logit Predicted Probability of Frisks, Searches, and Arrests, By Parolees Per Capita, For Whites and Non-Whites, in High-Crime Neighborhoods

FIGURE 3A. Whites

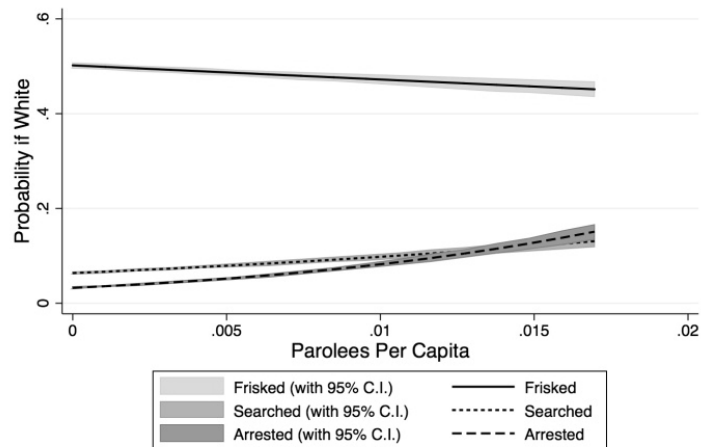
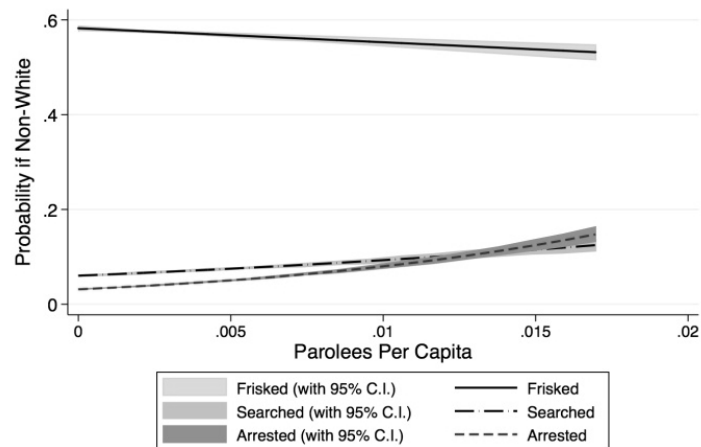


FIGURE 3B. Non-Whites



Figures 3A and 3B display parolees per capita on the x-axis and the probabilities of frisks, searches, and arrests on the y-axis. In both figures, searches and arrests increase consistently with parolees and frisks decrease consistently. The slope of each vector appears compressed by the large difference in scale. Recall that the base probability of being frisked is more than 50%, whereas the base probability of being searched or arrested is less than 10%. The change in each variable is comfortably outside the 95% shaded confidence interval. (In other words, the shift on the y-axis is greater than the shaded range on that axis.)

The results are robust. We also conducted all of the frisk, search, and arrest regressions including fixed effects dummy variables for each of the 76 police precincts in our data. This essentially adds a control variable for each different police precinct, which allows unknown idiosyncratic differences between neighborhoods or precincts to be accounted for without affecting our results. This enables us to be confident that there is no omitted variable bias due to the fact that high parolee per capita neighborhoods are “bad neighborhoods” in a way not captured by our control variables, such as high crime incidence. It also immunizes the data to problems arising from differences between different policies in different police precincts. The signs and significance of our three dependent variables remain the same for these regressions.<sup>325</sup>

All of the control variables are highly significant at the  $p < 0.01$  level, except for three in the arrest regression, which are not statistically significant at any level, and almost all are in the direction expected. It is worth noting that both race variables are significant, but not consistently in the direction expected. An expert report from the *Floyd* litigation found that individuals were being targeted for police stops on the basis of their race, but the report did not take account of parolee status.<sup>326</sup> Our results show that the effect of race is more complicated once parolee status is accounted for. As stated previously in relation to the probability of being stopped, the non-white/Hispanic variable is again positive for frisks and searches, meaning that the likelihood of being frisked or searched if you are in a minority-dense neighborhood is significantly higher than if you are in a predominantly white neighborhood. However, the individual race variable,

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325. The effects in these regressions are in fact stronger for frisks and searches, with coefficients of -5.22 and 4.06, respectively. The effect for arrests is slightly lower, with a coefficient of 4.16, but the coefficient is still positive and highly statistically significant. Additional results available from the authors.

326. Fagan, *supra* note 317, at 18 tbl.5.

“white individual,” is negative for frisks and positive for searches and arrests. Thus, once stopped, whites are less likely to be frisked but *more* likely to be searched or arrested.

This is reflected in that the only real difference between Figures 3A and 3B is that, consistent with the OLS results, non-whites are consistently frisked at higher rates than whites, but they are searched and arrested at lower rates. Thus whether using OLS or logit, parolees per capita is consistently associated with increased searches and arrests, and decreased frisks, and race has effects in both directions.

This does not show that police are not targeting minorities, since our Stop Data showed that police stop people in densely minority neighborhoods at significantly higher rates than in predominantly white neighborhoods. The lowered frisk result supports previous studies that have shown that “hit rates”—the proportion of searches that actually result in finding contraband—are higher for whites than minorities, which suggests that the level of suspicion necessary for a white person to be stopped may be higher than for a minority in the eyes of the police.<sup>327</sup> However it does complicate the picture somewhat: this data does not show that searches and arrests are higher for minorities; that is only true for frisks. Together, the results of our two databases imply that police may be targeting high minority neighborhoods rather than minorities themselves.

Two other aberrant results are that single-parent households are negatively correlated with frisks, as are searches within areas having high crime incidence. We have no clear theory for these two results. Otherwise, all of the community traits are positively associated with searches and frisks, consistent with our Stop Data. (The coefficients for arrests are non-differentiable from zero.) All of the other *Terry* factors are positively related to each *Terry* outcome. This is unsurprising since each of these factors contributes towards reasonable suspicion, and each is used to justify each police action.

One variable worthy of particular scrutiny is the frisk being justified (at least in part) by knowledge of prior criminal history. The knowledge of

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327. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037–38 (2011) (summarizing hit rates in six different states and cities and showing that some minorities are often twice as likely to be stopped as whites, yet the hit rate for whites is often one and a half or more times greater). For a critique of whether these discrepancies in hit rates necessarily establish racial discrimination, see Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1299 (2004) (arguing that whether racial profiling will decrease the amount of profile crime depends on the elasticity of each racial groups’ willingness to offend).

criminal history factor is used to justify frisks, so we have to omit it from the frisk regression, but it is positively associated with searches and arrests. This variable is somewhat of a proxy, albeit an over-inclusive one, for knowledge of the individual's parole status. Our Stop Data supports the theory that police often have knowledge of either individual parolee status or of parolee density in a given neighborhood. The positive and significant result for the knowledge of prior criminal history variable suggests that knowledge of criminal history status, which may include parole status, *may* also increase the police tendency to not only frisk but also to search and arrest. However, it may not. The result may simply be driven by more contraband being found when more frisks are undertaken, which is quite plausible given recidivism rates. Nonetheless, the former view is further supported by the fact that our results for the parolee-per-capita coefficients for both searches and frisks are *reduced* when this variable is included. This suggests that police do in fact have knowledge of parolee status—at least after initiating contact, if not before initiating the stop—and so they are more likely to stop, frisk, search, and arrest parolees. As mentioned, this effect is so strong that we see it reflected in the fact that *all* stop, frisk, search, and arrest rates are higher in neighborhoods with high parolee density.

Our results do not prove that it is the parolees who are actually being searched or arrested at higher rates. It is likely, given the low numbers of parolees even in high parolee density neighborhoods, that even if police target high parolee neighborhoods, they will mostly stop nonparolees. However, it is far harder to explain our results in the Frisk, Search, and Arrest Data if the police are *not* targeting parolees. Even if police are targeting high parolee neighborhoods but most or even all parolees managed to slip through the net, their neighbors still pay the price for the lower rights that the courts have deemed parolees to have. As such, our results support the possibility that the Fourth Amendment rights of nonparolees living in communities are being eroded by the various rules that lower the rights of parolees. In fact, it is hard not to reach the conclusion that nonparolee members of parolee-dense communities are suffering because, as mentioned, our numbers are substantively significant even though we are examining the effect of *any* person in the community being stopped, arrested, and searched,<sup>328</sup> not just parolees. Thus, these statistics imply that nonparolees (who make up the vast majority of these communities) are being negatively affected.

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328. The negative result on the frisk coefficient means that we cannot draw a similar conclusion for frisks.



To summarize the key conclusions we can draw from the results of our two databases:

1. Police target high parolee neighborhoods for increased stops.
2. Police are not simply targeting convicts, since frisks are negatively associated with parolees per capita whereas searches and arrests are positively associated.
3. Police are taking advantage of permissive parolee search rules that allow them to search parolees with effectively lowered standards of suspicion, since frisks are significantly lower yet searches are significantly higher in high parolee neighborhoods.
4. Arrests are positively associated with high parolee neighborhoods, suggesting that permissive parolee search rules may well be contributing to recidivism rates.
5. Nonparolees as well as parolees are likely being subjected to increased stops, searches, and arrests, and so these rules are having an adverse effect on the broader communities in which parolees live.

#### CONCLUSION

This Article has cast serious doubt on the wisdom of the current parole system in the United States. At every stage of their interactions with the state, parolees' rights are being diminished. *Samson* allows suspicionless searches, and thus effectively makes arrests of parolees more likely. Even in states such as New York that do not necessarily take full advantage of *Samson*, police are nevertheless given greater deference in factors that point towards suspicion when conducting *Terry* stops and frisks. Even without *Samson*, the courts' doctrine creates enormous leverage over parolees for police and others alike, since the potential repercussions of even ill-founded parole violations can result in three months of imprisonment. All these effects undermine parolees' residential options, job opportunities, and stabilizing relationships, which are the fundamental predictors of recidivism probabilities. At the same time, parole can even extend rather than reduce incarceration of parolees, even beyond maximum statutory terms. The goal behind these rules is strengthened law enforcement in order to reduce recidivism rates. However, all of these elements have rendered the parole system so punitive that not only does it undermine the rehabilitative aims of the system, but also it increases parolees' likelihood to reoffend by making them vulnerable to influence

and threats from law enforcement and criminal elements.

It is not only parolees who are bearing the cost of this jurisprudential miscalculation. Our empirical results show that whole communities are being adversely affected by these policies. Nonparolees who live in parolee-dense neighborhoods are being stopped, searched, and arrested at significantly higher rates, an effect not explained simply by high-crime neighborhoods or by racial profiling. Punitive conditions that the Supreme Court has approved for parolees cast a long shadow over nonparolees.

The modern parole jurisprudence needs to be reconsidered. However, the whole solution does not lie with the courts. Institutions at every stage of the parole process contribute to the attrition of rights that we describe. Public defenders could better advise arrestees of the implications of accepting plea bargains that involve parole. But many public defenders are not as aware of the adverse effects of parole as they should be. This is a product not only of the well-documented underfunding of those public defenders, but also of the institutional structure of those institutions.<sup>329</sup> For instance, parole violation units are sometimes separated from other divisions within public defender offices. Consequently, public defenders negotiating plea deals do not have meaningful interactions with those representing parolee recidivists, and so they can easily be unaware of the repercussions for their clients when they return to court on parole violations.

Similarly, parole offices are organized in such a way as to incentivize reporting violations of release conditions. Each parolee in custody is one less case in parole officers' typically overburdened caseloads, so those officers have an incentive to not only police minor offenses, but potentially even to create them. For instance, parole officers have the discretion to set mandatory meetings in the middle of the workday and then report parolees for violations for nonattendance. Any solutions to the harms of parole that are detailed in this Article have to involve rethinking all of the institutions that contribute to the problem.

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329. CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50–60 (2009), *available at* <http://www.constitutionproject.org/pdf/139.pdf>.

## APPENDIX: New York Stop, Question and Frisk Report Worksheet

**UF-250**

**Front**

(COMPLETE ALL CAPTIONS)

**STOP, QUESTION AND FRISK  
REPORT WORKSHEET**  
PD344-151A (Rev. 11-02)

Pct. Serial No. \_\_\_\_\_ Date \_\_\_\_\_ Pct. Of Occ. \_\_\_\_\_

Time Of Stop \_\_\_\_\_ Period Of Observation Prior To Stop \_\_\_\_\_ Radio Run/Sprint # \_\_\_\_\_

Address/Intersection Or Cross Streets Of Stop \_\_\_\_\_

☐ Inside ☐ Transit ☐ Type Of Location \_\_\_\_\_  
☐ Outside ☐ Housing Describe: \_\_\_\_\_

Specify Which Felony/P.L. Misdemeanor Suspected \_\_\_\_\_ Duration Of Stop \_\_\_\_\_

**What Were Circumstances Which Led To Stop?**  
(MUST CHECK AT LEAST ONE BOX)

☐ Carrying Objects In Plain View ☐ Actions Indicative Of Engaging In Drug Transaction  
☐ e.g., Slim Jinx/Pry Bar, etc. ☐ Furtive Movements  
☐ Fits Description ☐ Actions Indicative Of Engaging In Violent Crimes  
☐ Actions Indicative Of "Casing" ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime  
☐ Victim Of Location  
☐ Actions Indicative Of Acting As A Lookout  
☐ Suspicious Bulge/Object (Describe) \_\_\_\_\_  
☐ Other Reasonable Suspicion Of Criminal Activity (Specify) \_\_\_\_\_

Name Of Person Stopped \_\_\_\_\_ Nickname/Street Name \_\_\_\_\_ Date Of Birth \_\_\_\_\_

Address \_\_\_\_\_ Apt. No. \_\_\_\_\_ Tel. No. \_\_\_\_\_

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused  
☐ Other (Specify) \_\_\_\_\_

Sex: ☐ Male ☐ Female Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic  
☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age \_\_\_\_\_ Height \_\_\_\_\_ Weight \_\_\_\_\_ Hair \_\_\_\_\_ Eyes \_\_\_\_\_ Build \_\_\_\_\_

Other (Scars, Tattoos, Etc.) \_\_\_\_\_

Did Officer Explain? If No, Explain: \_\_\_\_\_

Reason For Stop ☐ Yes ☐ No

Were Other Persons Stopped/Questioned/Frisked? ☐ Yes ☐ No If Yes, List Pct. Serial Nos. \_\_\_\_\_

If Physical Force Was Used, Indicate Type: ☐ Drawing Firearm ☐ Baton ☐ Drawing Firearm ☐ Pepper Spray ☐ Handcuffing Suspect ☐ Other (Describe) \_\_\_\_\_

☐ Suspect Against Wall/Car

Was Suspect Arrested? ☐ Yes ☐ No Offense \_\_\_\_\_ Arrest No. \_\_\_\_\_

Was Summons Issued? ☐ Yes ☐ No Offense \_\_\_\_\_ Summons No. \_\_\_\_\_

Officer In Uniform? ☐ Yes ☐ No If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

**Was Person Frisked?** ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX**

☐ Inappropriate Attire - Possibly Concealing Weapon ☐ Furtive Movements  
☐ Verbal Threats Of Violence By Suspect ☐ Actions Indicative Of Possession Of Weapon  
☐ Knowledge Of Suspect From Criminal History ☐ Engaging In Violent Crimes  
☐ Other Reasonable Suspicion Of Weapons (Specify) \_\_\_\_\_

**Was Person Searched?** ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX** ☐ Hand Object ☐ Admission Of Weapons Possession

☐ Outline Of Weapon ☐ Other Reasonable Suspicion Of Weapons (Specify) \_\_\_\_\_

**Was Weapon Found?** ☐ Yes ☐ No **IF YES, Describe Contraband And Location**

☐ Machine Gun ☐ Other (Describe) \_\_\_\_\_

**Was Other Contraband Found?** ☐ Yes ☐ No **IF YES, Describe Contraband And Location**

**Reasons Made By Person Stopped:**

**Additional Circumstances/Factors: (Check All That Apply)**

☐ Report From Victim/Witness ☐ Evasive, False Or Inconsistent Response To Officer's Questions  
☐ Area Has High Incidence Of Reported Crime Of Type Under Investigation ☐ Clumping/Direction At Sight Of Officer/Night  
☐ Suspect's Behavior/Response To Stop/Questioning/Physical Contact/Other Factors ☐ Suspicious Actions/Behavior  
☐ Criminal Activity ☐ Suspect Is Associating With Persons Known For Their Criminal Activity ☐ Signs And Sounds Of Criminal Activity, e.g., Bloodstains, Fingerprint  
☐ Proximity To Crime Location ☐ Alarms  
☐ Other (Specify) \_\_\_\_\_

Pct. Serial No. \_\_\_\_\_ Additional Reports Prepared/Completed By No. \_\_\_\_\_ Juvenile Pct. No. \_\_\_\_\_ Adult Pct. No. \_\_\_\_\_ Other Pct. (Specify) \_\_\_\_\_

REPORTED BY: Rank, Name (Last, First, MI) \_\_\_\_\_ REVIEWED BY: Rank, Name (Last, First, MI) \_\_\_\_\_

Phil. \_\_\_\_\_ Phil. \_\_\_\_\_

Signature \_\_\_\_\_ Signature \_\_\_\_\_

Command \_\_\_\_\_ Command \_\_\_\_\_

**Back**